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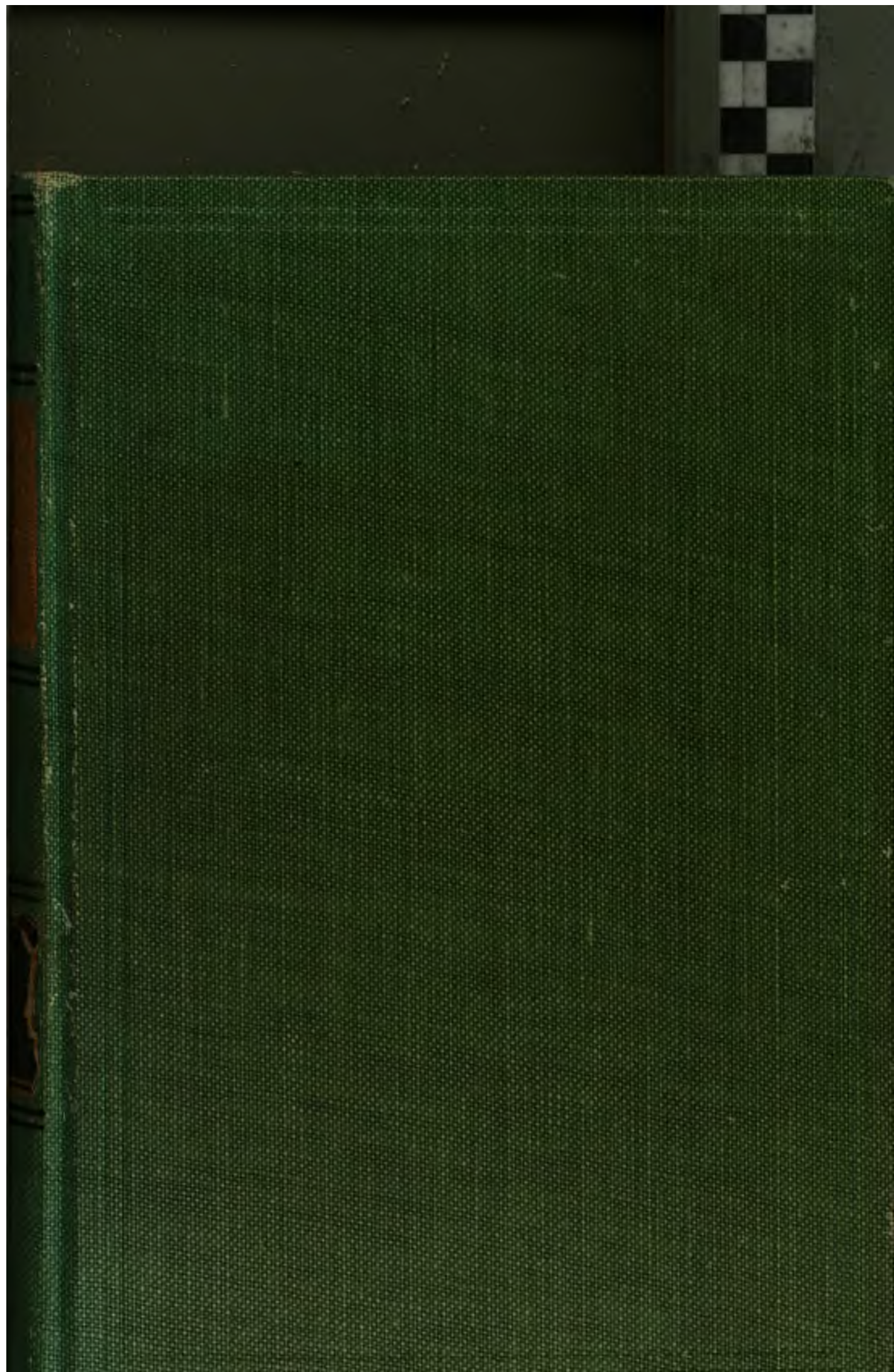
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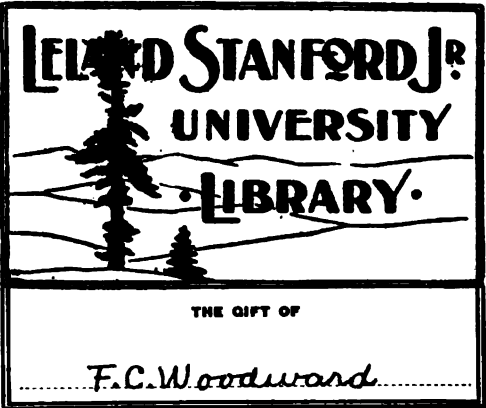
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# ELEMENTARY LAW

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## **PREFACE**

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This work is intended, as its title implies, as a first book for those who are entering upon the study of the law, and particularly for those who may take the course of **THE AMERICAN INSTITUTE OF LAW**. It is designed to give the student that general knowledge of the nature, sources, and subject-matter of the law, and of the elementary principles of both the substantive and the adjective law, without which he cannot take up and study the particular branches of the law to much advantage. The book is based upon Holland's *Jurisprudence*; Blackstone's *Commentaries*; Kent's *Commentaries*; Walker's *American Law*; the *Cyclopedia of Law and Procedure*; Smith's *Elementary Law*; Clark's *Criminal Law*; Jaggard on *Torts*; Clark on *Contracts*; Tiffany on *Agency*; and Tiffany on *Persons and Domestic Relations*.

The particular branches of the law, such as Constitutional Law, Criminal Law, Domestic Relations, Real and Personal Property, Contracts, Torts, Remedies, etc., are treated merely in a general way, only the elementary principles being given. These special branches will be separately studied during the course.

The study of cases under the direction of the professors will constitute an important part of the work of the Institute. These cases, carefully selected and arranged with reference to the subjects under consideration by the class, will be furnished to the students with instructions as to their study. A number of illustrative cases are given in the back of this volume, as to the study of which the student will be directed at the proper time. Other cases will be sent out from time to time in connection with particular subjects.

We have also included in this volume a short introduction on legal ethics, followed by the code of legal ethics recently adopted by the American Bar Association.



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**ELEMENTARY LAW**  
**PART I**  
**ELEMENTARY JURISPRUDENCE**





## CHAPTER I

### NATURE OF LAW AND THE VARIOUS SYSTEMS

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§ 1. Law in General. The word "Law" in its broadest sense signifies "a rule laid down or established." Laws may be broadly divided into:

- (1) The laws of physical science — that is, the laws which govern physical objects; and
- (2) The laws of human action.

All material things, whether animate or inanimate, are said to be under the control of law. A governing impulse manifests itself in the movements and conditions of all natural objects — of rocks and stones and other inorganic things as well as of the lower animals and man. All the rules to which these diverse things are subject bear a general resemblance to each other, bringing them within the most comprehensive meaning of the word "law," which has been stated above. Those laws, however, which regulate the movements of nature, and which may be called the "laws of physical science," are different in their essential character from those which govern the acts of men. The former command objects which lack any power to shape intelligently their own course of conduct, while the latter have to do with men as beings endowed with reason and the ability to determine for themselves what they will do. In other words, the laws of physical science govern mere movement, which is characteristic of beings in whom will power is absent, while the other systems regulate action, which proceeds from an intelligent resolve. A law of physical science, being addressed to objects which have no power to disobey, is in reality nothing more than an order in nature by which certain results follow certain causes. It is impressed upon matter in such a way that it must inevitably be observed. Thus, under the law of gravitation, if an apple becomes disengaged from the stem, it must fall to the ground, un-

less some other substance intervenes. There is no power in the apple to choose between that result and some other, but it must of necessity comply with the exact terms of the universal rule.

§ 2. **Laws of Human Action — Sanction.** The laws of human action include all systems of laws which are addressed to men as beings possessed of will power and discretion, and obedience to which is enforced by some form of sanction. By the term "sanction," in its relation to law, is meant the means which the author of the law employs to compel obedience to it; the prospect of some evil which will follow its disobedience, or of some benefit which will follow its observance, or both.

Men are, of course, equally with inanimate nature, under the control of the laws of physical science. All the involuntary movements of the human organism, as the circulation of the blood, the process of digestion, etc., are subject to them. But, as beings possessed of discretion and will power, men come under the direction of those other systems of laws which differ primarily from the laws of physical science, in that they lay down rules which may or may not be obeyed according to the will of the persons to whom they are addressed. For convenience, we will call these last-mentioned systems, collectively, the "laws of human action." Obedience to them, not being inevitable, is enforced by what is known as "sanction." The sanction of a law is the means which the author of that law employs to compel obedience to it when such obedience is not inevitable.<sup>1</sup> It may take the form of threats of punishment, as it usually does in the criminal systems; it may be an assurance on the part of the maker of the law that he will compel any one who violates it to make compensation to any one injured by such violation; or it may be of a more indefinite character, as in the case of the moral law. Whatever form it may take, it is sanction which gives to every law of human action its force and stability. The various systems of laws of human action differ from each other in their mode of establishment, the nature of their principles, and the sanctions by which they are accompanied.

The leading systems of laws of human action are: (1) The moral law; (2) the divine law; (3) the municipal or positive law; and (4) international law; to which may be added, (5) maritime law, which, although sometimes spoken of as a system,

1. "A command, as Austin has pointed out, is a signification of desire; 'but a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other in case he

comply not with the desire.' And, as every law is a command, every law imports this liability to evil also, and it is this liability to evil which we call by the name of 'sanction.'" Markby *Elements of Law*, § 192.

is not a system distinct from those mentioned, but is in a sense a part both of the municipal and the international law; and (6) martial law, which is in force only during the time of war, and on or near the field of active military operations, and which is a part of the municipal law.

**§ 3. Moral and Divine Law.** The moral law is that system of rules of human action which has its origin in a general sense, on the part of the members of a civilized community, of what is right and wrong, and which finds its sanction in the general disapprobation when any act in violation of it is committed. This system of law is of gradual growth. Its principles are founded on the experience of civilized mankind, and, as that experience grows larger and reflection on it more profound, the system develops. It is assisted in its growth by the precepts and reasonings of teachers and writers, as well as by the doctrines of religion. Depending, however, as it does, upon the general sentiment of the members of a community, the moral law fluctuates as public opinion changes; and the morality of one people may differ in many points from that of another of a different race or grade of civilization. The moral law, as such, is enforced by indeterminate and uncertain authority. There are no tribunals in which it may be administered. There is no power to try formally alleged offenders against it, and no definite punishment attached to a violation of its principles. Yet, in spite of the vague character of its sanctions, those sanctions exist; being found in the general approbation which is felt toward those who habitually obey it, and disapproval toward those who do not regulate their lives in conformity with its doctrines. The moral law, of course, has a controlling influence upon, and to a great extent shapes, the municipal or positive law, which we shall presently consider.

The divine law is the law of religion and faith. It is that system of rules of human action which most men believe to have been established by God and communicated to mankind by revelation, and whose sanction lies in the assurance of certain rewards and punishments in the present life or in the life to come. These laws also have their influence in the shaping of municipal or positive law.

**§ 4. Municipal or Positive Law.** The municipal<sup>2</sup> or positive law is that system of rules of human action established by the governmental power in a state;<sup>3</sup> and it may be either written or un-

<sup>2</sup> The term "municipal" properly means "pertaining to a city or free town (*municipium*). Its use here, however, is in the sense of "pertaining to a state or nation." The distinction between the two usages should be kept clear.

<sup>3</sup> The word "state" is used in this sense to denote any organized political society. See *infra*, § 8. It should not be confused with "State" referring to one of the United States.

written. A "municipal law," as defined by Blackstone, is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and forbidding what is wrong."

This is the law with which the lawyer has chiefly to deal. It differs from the moral law, in that it is laid down by determinate authority and is enforced by determinate sanctions. It is akin to the divine law in the general manner of its establishment, but is distinguished from it by the fact that it is of human origin and human enforcement, and that its punishments are dealt out exclusively in the present life. It is not to be understood, however, that the municipal law, the moral law, and the divine law have no principles in common. Many rules, like those forbidding murder and theft, while retaining the moral sanctions, are also invariably incorporated into the municipal and divine systems. The municipal law is called "positive law," because it is imposed by an authority having undisputed power to insist upon its observance.

A municipal law is a rule of human action, as distinguished from a mere arbitrary command. It must be general, applying to all actions of a particular class, not to a single act alone. A mere order or proclamation commanding one to do a certain act would not be a law; but if it commands all persons, or a class of persons, to act in a certain way, under certain circumstances, such an order would be a municipal law, if it is of such a nature that the state will enforce it.

A municipal law is also to be distinguished from a contract. Every citizen of a particular state is subject to the laws of that state without assenting to them. So far as the state's authority is not limited, the subjects' actions are under its control. On the other hand, a contract is something which the individual assumes voluntarily. The obligations of a contract, when made, have practically the same force as law, because the state will compel their performance; but they originate in the free promise of an individual, and bind that individual alone.

The rules of municipal law are established by the governmental power in the state. They may be laid down expressly and formally by a legislature, or, though not so laid down, rules may become law by recognition and enforcement on the part of the authority by which the laws are applied. If established by express promulgation, they are called "written laws";<sup>4</sup> if established by recognition merely, the name "unwritten laws" is applied to them. The unwritten laws are also called "customary laws," because they have their principal source in those customs of a community which are so uniformly observed that their observance

4. See *infra*, § 38 *et seq.*

at last comes to be regarded as necessary to the welfare of the community, and is enforced by the state.<sup>5</sup>

5. See *infra*, § 28 *et seq.* Blackstone's definition and explanation of municipal law is as follows:

"Municipal law . . . is properly defined to be 'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.' Let us endeavor to explain its several properties, as they arise out of this definition. And, first, it is a *rule*: not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason: this has permanency, uniformity, and universality, and therefore is properly a *rule*. It is also called a *rule*, to distinguish it from *advice* or *counsel*, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the law depends not upon our *approbation*, but upon the *maker's will*. Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

"It is also called a *rule*, to distinguish it from a *compact* or *agreement*; for a compact is a promise proceeding from us, law is a command directed to us. The language of a compact is, 'I will, or will not, do this;' that of a law is, 'thou shalt, or shalt not, do it.' It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising any thing at all. Upon these accounts law is defined to be 'a *rule*.'

"Municipal law is also 'a rule of *civil conduct*.' This distinguishes municipal law from the natural, or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour than those of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and peace of the society.

"It is likewise 'a rule *prescribed*.' Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified *via voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a

§ 5. **International Law**—a. **In General.** International law includes the entire body of obligations which one nation owes to another with respect to its own conduct or the conduct of its citizens toward other nations or their citizens; and is either public or private.<sup>6</sup> We shall see that, for the purposes of government, men have organized themselves into states or nations; and each nation administers its own system of municipal law. As the world contains many independent nations, which necessarily have considerable intercourse with one another, it is natural that a necessity should be felt for rules by which such intercourse is to be regulated. This want is supplied by the system of rules known as the "international law." These rules apply either to the dealings of sovereign nations with each other, or to cases where the courts of one nation deal with rights acquired under a foreign law, in which case that foreign law is sometimes applied, rather than that of the nation to which the court belongs. The former class of rules forms what is called the "public international law"; the latter, the "private international law."

b. **Public International Law.** Public international law is that which regulates the political intercourse of nations with each other. It consists of those rules of conduct which independent nations or states agree, either expressly or tacitly, to regard as binding on themselves, and which regulate their intercourse with one another.<sup>7</sup> It differs from the municipal or positive law in

crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term '*prescribed*.' But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he *might* know were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

"But farther: municipal law is 'a rule of civil conduct prescribed by the supreme power in a state.' For legislature, as was before observed, is the greatest act of superiority that

can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other." 1 Blackstone Comm. 44-46.

6. See 22 Cyc. 1699.

7. See 22 Cyc. 1699.

Much confusion has arisen from a neglect to distinguish between international law (*jus inter gentes*) and the law of nations (*jus gentium*). The former is properly the system which regulates the intercourse of nations with each other; the latter is made up of those rules which are of such natural justice that every nation has made them a part of its municipal law. An example of the rules of the latter system is the law forbidding murder. Any law which all nations enforce is a part of the law of nations; but it has no more connection with the international law than has any other rule of municipal law.

these respects: In the first place, it is not established by any power having recognized authority to lay down its rules; there being no authoritative international legislature. And in the second place, its sanctions are not definite and regularly fulfilled; there being no international courts for its interpretation and enforcement. Each nation construes it in its own way, and if any nation refuses to obey its rules, war is the only way by which obedience can be enforced or redress obtained. There is, however, actually a body of international law which is ascertainable and by which, when ascertained, international relations can be controlled and adjudicated between nations, when they agree to submit controversies to properly organized tribunals, as in cases of international arbitration, and by which courts of law may determine the relations between parties over whom they have jurisdiction.<sup>8</sup> The public international law is classed as a law of human action, on the theory that national action is nothing more than human action in groups.

c. *Sources.* The principal sources of international law are (1) the writings of jurists, (2) the customs of nations, and (3) treaties. The writings of the jurists form a system having about the same force upon nations as the laws of morality have upon individuals. They lay down what the international law ought to be. And yet those principles and rules on which those writers agree are regarded as of great authority. No nation would presume to act contrary to the established rules of the international moral code. As soon, however, as a rule becomes embodied in the customs of the nations, it is recognized as having more than a mere moral force. As the international law properly consists of those rules which nations agree to regard as obligatory upon themselves, it becomes an important question, how is their assent to those rules to be indicated? The fact that they habitually observe them in their intercourse with other nations would be the best evidence of an intention to adopt them as law. Thus it follows that international usage is of the most binding authority.

Treaties are compacts between two or more nations which, when once adopted, have, as to those nations which enter into them, the force of international law. It is plain, however, that treaties are ordinarily binding only upon the parties to them. They stand in much the same relation to international law proper that contracts do to the municipal law.<sup>9</sup>

To the above sources may be added: (1) The decisions and conclusions of prize-courts, of official international conferences,

8. See 22 Cyc. 1700.

9. As to treaties see *infra*, §§ 38, 42.



and of arbitration tribunals; (2) state papers of jurists and opinions of attorneys-general; (3) instructions, regulations, and ordinances issued by the states or nations for the guidance of their own citizens or subjects, officers, and tribunals; (4) history of wars, negotiations, and current events; and (5) the proposed codes and formulated views of voluntary international associations of jurists.

**d. Private International Law.** Private international law consists of the collection of rules which regulate the courts of one nation or state in enforcing rights which have been acquired under the laws of a foreign nation or state. It has generally been treated under the title "Conflict of Laws," and is "that branch of jurisprudence arising from the diversity of the laws of different nations in their application to rights and remedies, which reconciles the inconsistency, or decides which law or system is to govern in the particular case, or settles the degree of force to be accorded to the law of a foreign country, either where it varies from the domestic law, or where the domestic law is silent or not exclusively applicable to the case in point."<sup>10</sup>

Every sovereign nation has the exclusive power to make laws to govern its own dominions; and municipal law can have no intrinsic force except within the territorial limits of the nation which establishes it. But, as a matter of national comity, one nation often enforces the laws of another in certain cases. Thus, as a rule, a marriage which is valid by the laws of the state or nation in which it takes place will be recognized and treated as valid, so far as the form of ceremony is concerned, in another state or nation, although not entered into in accordance with its laws.<sup>11</sup> So also a contract entered into in one nation or state and valid by its laws will generally be held valid and enforced in another nation or state.<sup>12</sup> And a will which is valid by the laws of the state where it is made will be recognized as valid and enforced as to personal property in other states.<sup>13</sup>

Whatever extraterritorial force a nation's laws may thus have, however, is purely a matter of courtesy extended by another state. Still, this courtesy has in some cases become so habitual as to make its observance a matter of international right.

**§ 6. Maritime Law.** The maritime law is that branch of the law which particularly relates to commerce and navigation, to business transacted at sea or relating to navigation, to ships and shipping, to seamen, to the transportation of persons and property by sea, and to marine affairs generally.<sup>14</sup>

10. See 8 Cyc. 568.

11. See 26 Cyc. 829.

12. See 9 Cyc. 664, 671, 672.

13. See "Wills," Cyc.

14. See "Admiralty," 1 Cyc. 797, and cross-references there given.

The territory of nations is in the main limited to land, and, while each nation has exclusive control over its own inland waters, it is a principle of the international law that the sea cannot, except to a very limited extent, be appropriated by one nation to the exclusion of others. Since a large portion of the earth's surface is thus outside of the limits of ordinary national jurisdiction, and since it is of such a nature that various kinds of crimes and other wrongs may be committed on it as well as on the land, some form of control over acts done on the sea is necessary; and the international law has apportioned jurisdiction over it between the various nations in the following manner:

1. Each nation has exclusive jurisdiction over a narrow strip of the sea along its coast, the width of which is usually fixed at one marine league, or three miles, from low water mark on the shore. Such waters are called the "territorial waters" of the nation which controls them. The reason that this limit has been fixed is that each nation is regarded as able to assume jurisdiction over the sea so far as its guns can carry, and therefore it is possible that modern improvements in firearms may result in an extension of this limit.

2. Each nation has control over its citizens or subjects when outside of its territorial limits; although, when they are within the limits of the jurisdiction of some other nation, they are also subject to the authority of that nation.

3. Each nation has exclusive control and jurisdiction over all ships belonging to it, whether public or private, while they are on the high seas, and not within the territorial waters of another nation, vessels on the high seas being regarded as a part of the territory of the nation whose flag they fly and to which they belong.

4. Each nation also has exclusive jurisdiction over its ships of war and other public vessels even when they are in the territorial waters or harbors of another nation.

5. As to ordinary merchant and other private vessels, the rule in England and in America is that they come under the jurisdiction of the nation in whose harbor or territorial waters they may be, although the home government also has a qualified concurrent jurisdiction over them.

6. Vessels engaged in piracy, although they may fly the flag of a particular nation, do not belong to and are not recognized by any nation. They are regarded as outlaws, and any nation may attack and punish them.

Within the limits of its jurisdiction each nation applies its own system of maritime law as a branch of its municipal law. Matters of a maritime character, including maritime contracts,

torts, and crimes, are adjudicated in courts called "courts of admiralty"—with us in the federal courts. By express provision of the federal constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction.<sup>15</sup>

§ 7. **Martial Law.** Martial<sup>16</sup> law is that rule of human action which in time of war and on or near the field of active military operations, is established and enforced by the officer in charge of those operations. The normal condition of the nations of the world is that of peace, but international differences frequently result in war. In time of war, and within the scope of active military operations, the municipal law is superseded by what is known as "martial law." The suspension of the municipal law, and the establishment of this martial rule, are based upon paramount necessity, and are only justified so far as they are absolutely necessary to the proper conduct of the war. The operation of the martial law is confined to the camp or battle ground and its immediate vicinity. Its rules are largely discretionary with the officer in charge, but he must use his discretion in accordance with the military law and the usages of war; and, if he exceeds or abuses the authority vested in him, he is liable for such abuse or excess to any person injured thereby.

15. See 1 Cyc. 806.

16. Martial law should not be confused with military law. The latter is the system of rules and regulations

which govern a nation's military forces; the former controls all persons within its territorial jurisdiction, civilians as well as soldiers.

## CHAPTER II

### GOVERNMENT

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### A. GOVERNMENT AND ITS FUNCTIONS IN GENERAL

§ 8. The State. A state is a body of persons, living within a specified territory, permanently organized for the purposes of government.<sup>1</sup>

Of the various kinds of law which have been mentioned, the municipal or positive law is the one with which we are chiefly concerned. We have already shown that the distinguishing feature of this system is that it is "established by the governmental power in a state." The nature and scope of that law, therefore, can best be understood by an inquiry into the nature and functions of the organization to which the term "state" is applied. Aristotle spoke truly when he said that man is a political animal. He is a creature of many wants, to supply which constant dealings with his fellow men are necessary. It was early found that in these dealings men would not always respect the rights of their fellows through the influence of moral and religious sanctions alone. We may suppose that the fear that others would encroach upon their rights gave rise to a desire for definite laws, the sanctions of which would be certain and prompt in their fulfilment. The organization of political society, or the state, made such rules possible. Without the state as its maker and

1. And see 22 Cyc. 1706.

enforcer, the positive law could not exist. Because this law is necessary to human welfare, the state is also necessary, and history does not reach back far enough into the past to reveal a civilized people without some form of political organization.

§ 9. **Sovereignty.** Sovereignty is the absolute, unlimited power of governing, without control by or responsibility to any political superior. Only sovereign states are recognized in international affairs.<sup>2</sup>

The chief purpose of the state is to provide for the establishment and enforcement of the municipal or positive law, or, in other words, to provide for civil government within its territorial limits. In order that this purpose may be accomplished, there is, in legal contemplation, vested somewhere in every independent state the absolute power of exercising governmental control or providing for its exercise. This power is called "sovereignty." At some periods of history, sovereignty was regarded as vested in a single ruler by divine right. At other times, it was believed to be lodged in certain classes of persons who were presumed to be best able to govern well. In the principal modern states, however, the sovereign power is, in practice at least, recognized to be in the people as a whole.<sup>3</sup>

A state is said to be sovereign or independent when it has this sovereignty within itself, and dependent when the ultimate governing power exists in some other state or ruler to whom it owes allegiance. Thus, before the Revolution, the sovereignty of the American colonies was not vested in themselves, but was in the English nation. The Declaration of Independence was an assertion that it was wrongfully so vested. After the Revolution, it became inherent in the new American States, and was so recognized. As stated above, only sovereign states are recognized in international affairs.

In an independent state the sovereign power need not be vested in those who actually make and enforce the laws. Assuming sovereignty to be vested in a certain person or persons, there is nothing to prevent their delegating some or all of their governmental powers to agents or officers. This was done only to a very limited extent in those states where sovereignty was regarded as vested in a single ruler or a limited number of persons; but under the modern theory of popular sovereignty, if the number

2. See 22 Cyc. 1716.

3. This doctrine, it need hardly be said, is at the foundation of all American institutions. "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among

these are life, liberty, and the pursuit of happiness; that, to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed." Declaration of Independence, July 4, 1776.

of persons belonging to a certain state is of sufficient magnitude to render it inconvenient for all to participate directly in the government, which is usually the case, the delegation of power is invariably resorted to. When those possessing the sovereign power in a state delegate the ordinary functions of government to public officers, such officers thus having power to govern within certain limits, that state is said to have representative government.

§ 10. *The Constitution.* A "constitution" may be defined as the collection of principles and rules, established by the sovereign body, in accordance with which the government of the state is to be conducted. Those possessing the sovereign power are able to impose upon their governmental officers such restrictions as they may see fit. In most states there is a collection of principles and rules, either expressly established by the sovereign body, or which have grown up through custom, by which the action of these officers is controlled, and their relation to the sovereign body defined. This collection of rules and principles is called the "constitution" of the state, and it is said to be the fundamental law of the land. The constitution of a state can legally be changed, therefore, only by those who possess the sovereign power. By them it may be altered in any way, or even abolished.<sup>4</sup>

§ 11. *The Government and Its Relation to Its Subjects.* A subject, in one sense, is one who is bound to submit to the control of the government in a state. He may be either (1) a citizen, or (2) an alien.

Set off against those by whom the various powers of governing are exercised, and whom we will call, for want of a better term, the "government," are the remaining members of the community, who, in their relation to the government, are called "subjects." It is the function and power of the government to establish municipal laws, within the limits prescribed by the constitution, and to compel all subjects to obey them. A subject, therefore, is one who is bound to submit to the control of the government in a state. We find these three elements, (a) a sovereign person or body, (b) governmental officials, and (c) subjects, in every important state. In many states a particular person may be a member of more than one class. Indeed, in a state with popular representative government, a person may be a governmental officer, a member of the sovereign body, and a subject at the same time. Such a condition can easily be seen to exist in the United States, in the case of any government official.

As stated above subjects may be either citizens or aliens. A citizen of a state is one who is a permanent member of that state, to which he owes perpetual allegiance.<sup>5</sup> An alien is one who,

<sup>4</sup> As to the federal and state constitutions in the United States see *infra*, §§ 38, 40, 43.

<sup>5</sup> See 7 Cyc. 132.

owing perpetual allegiance to some other state, is yet bound to obey the laws of the state in question while within its territorial limits. All persons who are not citizens of a particular state are, as to that state, aliens.<sup>6</sup>

§ 12. **The Functions of Government.** The primary object of government is recognized to be the protection of the rights of life, liberty, and property. The rules governing these absolute rights of persons form the nucleus of all systems of law. But in civilized states the government usually undertakes also, to a certain extent, to provide for the positive welfare of its subjects. Every modern government, for example, assumes the conduct of a postal system, the coining of money, the regulation of weights and measures, and many other functions which are not connected with the mere administration of justice. These various functions render government a much more complicated process than it would be were it restricted to the protection of personal and property rights.<sup>7</sup>

§ 13. **The Forms of Government.** The forms of government in different states vary as the character, traditions, and environment of the people who compose them are different. The various forms of government are: (1) Patriarchy, or government of the family. (2) Monarchy, which exists when all governmental powers are vested in a single person. (3) Aristocracy, which exists where all the governmental powers are vested in a limited number of persons. (4) Democracy, which exists where the governmental power is vested in and exercised by the people as a whole.

6. See 2 Cyc. 81.

7. Woodrow Wilson, in his work on "The State," gives the following list of the usual functions of government, using the term "constituent" to indicate those functions which are necessary to the proper administration of justice, and "ministrant" to denote all other ordinary functions:

(a) Constituent functions: (1) The keeping of order, and providing for the protection of persons and property from violence and robbery; (2) the fixing of the legal relations between man and wife, and between parents and children; (3) the regulation of the holding, transmission, and interchange of property, and the determination of its liabilities for debt and for crime; (4) the determination of contract rights between individuals; (5) the definition and punishment of crime; (6) the administration of justice in civil causes;

(7) the determination of the political duties, privileges, and relations of citizens; (8) dealings of the state with foreign powers, the preservation of the state from external danger or encroachment, and the advancement of its international interests.

(b) Ministrant functions: (1) The regulation of trade and industry; (2) the regulation of labor; (3) the maintenance of thoroughfares; (4) the maintenance of postal and telegraph systems; (5) the manufacture and distribution of gas, the maintenance of waterworks, etc.; (6) sanitation, including the regulation of trades for sanitary purposes; (7) education; (8) care of the poor and incapable; (9) care and cultivation of forests and like matters, such as the stocking of rivers with fish; (10) sumptuary laws, such as "prohibition laws."

*Patriarchy.*—The earliest form of government of which we have any knowledge is the patriarchy. This was the government of the family. But the patriarchal family was not confined to the man and wife with their own minor children simply. When these children grew up and married, they still remained under the control of the first father as long as he lived, and so did his still more distant descendants. The governing authority was exercised, therefore, by the oldest living male from whom all the other members of the family were descended. When he died, his descendants would divide into as many families as he had sons. A modern example of a form of government similar in some respects to the ancient patriarchy is found in the tribal rule of the North American Indians. It is not in vogue in modern civilized states.

*Monarchy.*—Monarchy is the government which exists when all governmental powers are vested in a single person. It may be either (1) absolute, or (2) limited or constitutional; and either (1) hereditary or (2) elective. This is a very ancient form of government. It has existed in some form at every stage of the world's history. It may take the form of an absolute monarchy, in which the ruler is completely sovereign and irresponsible; or it may be a limited or constitutional monarchy, in which the monarch governs under limitations prescribed by a sovereign power superior to himself. It is almost unnecessary to say that purely absolute monarchies are very scarce in modern times. On the other hand, constitutional monarchy is one of the most important forms of modern government. Again, a monarchy may be hereditary, in which the ruler acquires his right to power by virtue of his descent from a previous ruler; or elective, when he is chosen to fill the office of monarch by vote of the sovereign body.

*Aristocracy.*—Aristocracy is the government which exists when all governmental powers are vested in a limited number of persons. "Aristocracy" literally means the government of the best. The form does not exist in its simplicity in any important modern state, but it enters as an element into many European governments. In ancient times, many pure aristocracies existed.

*Democracy.*—Democracy is the form of government which exists when the governmental power in the state is vested in and exercised by the people as a whole. Pure democracy, it is plain, can only exist in very small communities, for it involves the coming together of the whole people to make the laws. The inconvenience of thus assembling is, in large states, obviated by the delegation of the actual governmental duties to public officers.



When this is done, the government is called a "representative democracy" or "republic." By the use of the representative principle, the territory which may be united into a single democratic state is practically unlimited.

**§ 14. Confederation of States.** A confederation of states, or a confederacy, is the name applied to a number of states which have, by treaty, agreed to act in common concerning certain specified matters. A confederacy is a mere league of states. Each state retains its full sovereignty, and therefore no sovereign power is vested in the confederacy itself.

**§ 15. The Modern Federal State.** A federal state, on the other hand, exists where several states have surrendered to a permanent central government full power in certain matters of a common interest, retaining in themselves only a power limited to such affairs as are not within the jurisdiction of the central government. The federal state is a permanent political organization, while a confederation, depending upon treaty, may be discontinued by the withdrawal of the states which form it. Such a withdrawal is called "secession." In the American Civil War the principal issue was whether the United States constituted a federal state or a mere confederacy. If the latter, any State might rightfully withdraw from the Union at any time when, in its opinion, the terms of the treaty of confederation were broken. If, however, the Union was a federal state, it was as permanent as the individual States themselves.

**§ 16. The Branches of Government.** The government performs its functions through the establishment and execution of laws. It has been thought necessary for the attainment of the highest excellence in the performance of these functions that the duties of making, applying, and executing the laws should be distributed between different bodies of officers; hence most of the leading states have three different branches of government, called the "legislative," "judicial," and "executive" branches, respectively.

The legislative branch or department of government is the department whose duty and power it is to establish laws.

The judicial department is that department whose power and duty it is to interpret the law, and apply it to particular cases. We have seen that a law is in the nature of a rule. It is the judicial duty to show the application of this rule to a particular state of facts.

The executive department is the department which has for its function the execution of the laws. The execution of the laws may consist merely of carrying out the instructions of the judicial power in the fulfilment of the sanctions of the law, or it may be a direct compliance with the instructions of the legislative

branch of the government. Executive officers are now the servants of one, now of the other, department. Let us suppose, to illustrate the latter class of executive function, that the legislature pass a law providing for the stocking of a certain river with fish. It is hardly probable that such a law would ever come before the judiciary for interpretation and application. It is executed, therefore, by some executive officer — a fish commissioner, perhaps — actually putting the fish into the river.

## B. GOVERNMENT IN THE UNITED STATES

§ 17. **General Character of United States Government.** The United States is a noted example of a pure federal state. It is composed of organized communities, technically called "States," so united under a general national government that, while each individual State retains control over its own local affairs, and is supreme as to those affairs, yet the general government is permanent and supreme as to certain matters delegated to it. In other words, the United States constitution is not a mere compact or treaty of confederation between the States, but an instrument creating a government on such a plan that the nation and the States are both supreme, the former in matters of a national character, the latter in all other matters; and the question what matters are to be regarded as of a national character is answered in the constitution itself. The form of both the national and State governments is that of representative democracy or republic.

§ 18. **The Colonial Government.** Previous to 1776, the inhabited portion of the territory now occupied by the United States was divided among thirteen colonies, all of which were under the governmental control of England. The colonies were allowed certain rights of self-government, most of them having a local legislative body, whose laws might, however, be defeated by the royal governor of the colony by a mere refusal of his assent to them. The English parliament reserved and exercised the right to legislate for the colonies whenever it saw fit to do so. Each colony was distinct in its government from every other, but they had at various times sent delegates to general conventions or congresses which were called for the purpose of discussing provisions for their common defense against the Indians and other matters pertaining to the general welfare. It was not till 1774, however, that a regular series of these assemblies began, under the name of "Continental Congresses"; and it was one of these congresses which, in 1776, as representatives of the people of the colonies, issued the Declaration of Independence. In this instru-

ment the colonies formally renounced all allegiance to the British crown.<sup>8</sup>

§ 19. **Revolutionary Government and Articles of Confederation.** The Articles of Confederation consisted of a mere compact between the States, in which it was plainly stated that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not, by this confederation, expressly delegated to the United States in congress assembled." During the early part of the war which followed the Declaration of Independence, such government as the new States had was exercised by the continental congress. This form of rule was revolutionary, and somewhat unstable in its character. The need was soon felt for a stronger form of government. The first effort to meet this need was the adoption of the Articles of Confederation. Under these articles, the confederation was a loose league between the States. It was soon found that the general government did not have sufficient power to adequately perform its functions;<sup>9</sup> and this led to the adoption of the constitution.

§ 20. **The United States Constitution.** A recognition of the deficiency of the Articles of Confederation led to the summoning of

8. The enacting clause of the declaration was as follows: "We, therefore, the representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown; and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor."

9. Judge Cooley sums up the defects of the Articles of Confederation in a singularly concise manner: "The confederation was given authority to make laws on some sub-

jects, but it had no power to compel obedience. It might enter into treaties and alliances which the States and the people could disregard with impunity. It might apportion pecuniary and military obligations among the States in strict accordance with the provisions of the articles; but the recognition of the obligations must depend upon the voluntary action of thirteen States, all more or less jealous of each other, and all likely to recognize the pressure of home debts and home burdens sooner than the obligations of the broader patriotism involved in fidelity to the Union. It might contract debts, but it could not provide the means for satisfying them. In short, it had no power to levy taxes, or to regulate trade and commerce, or to compel uniformity in the regulations of the States. The judgments rendered in pursuance of its limited judicial authority were not respected by the States. It had no courts to take notice of infractions of its authority, and it had no executive. . . . It became at last difficult to enlist sufficient interest in its proceedings to keep up the forms of government through the meetings of congress and of the executive committee." Cooley Const. Law 15.

a convention of delegates from the several States to meet in Philadelphia in May, 1787, for the purpose of revising the articles. Instead of a mere revision of them, however, it was thought best by the delegates to formulate a new plan of government. Accordingly, they prepared the instrument which was then called and is still referred to as the "Constitution of the United States of America." This constitution was adopted by the States and went into effect March 4, 1789. The constitution, as above stated, is therefore a purely written constitution. It is not limited by any unwritten rules except those relating to its interpretation. Many countries, like England, for example, have what is called "unwritten constitutions," by which is meant that their governments are regulated by rules which are not embodied in any one formal document. These rules are traditional or customary, and, although they are sometimes reduced to writing, in the historical papers and records of the nation, such records are usually fragmentary, and valuable only as evidence of what the rules are, rather than as having any intrinsic authority. In the United States, however, the constitution is the source of all governmental regulations. The constitution of the United States created a strong central government, which is known as the "Federal Government." Each State, in adopting it, surrendered to this central government a portion of its authority. Among the various functions which are thus delegated to the federal government are the conduct of all international affairs;<sup>10</sup> the carrying on of war; the regulation of foreign and interstate commerce; the coinage of money; the conduct of a postal system; patent and copyright matters; and various other functions which pertain to the nation at large, rather than to any one locality.<sup>11</sup>

**§ 21. Relation of the State and Federal Governments.** The powers of the federal government in the United States are limited to those granted to it either expressly or by implication in the United States constitution. All other powers are reserved to the State governments.

The federal constitution contains a grant of powers to the central government. There have been various views entertained as to the proper interpretation to be applied to the instrument; but

10. All international affairs being within the control of the general government, foreign nations do not recognize the individual States as sovereign nations; yet, although that portion of the sovereignty which pertains to foreign relations is exercised through the federal government, the sovereignty in respect to all matters of mere local importance finds its ex-

ercise through the state governments. The sovereignty itself is, of course, in the people; but the people have ordained that it shall be exercised through two different instruments,—the federal and the State governments.

11. As to the constitution of the United States see *infra*, § 40.

it is now generally agreed that its construction should be liberal; that the federal government should be allowed to exercise, not only the powers expressly delegated to it, but also all those incidental powers necessary to carry the express powers into execution. The constitution also contains certain restrictions on the powers of the several States; for example, the rule that no *ex post facto*<sup>12</sup> law shall be passed.<sup>13</sup>

The State and the federal governments are two distinct parts of the same system. They are vitally united, yet so distinct in their powers that there is no conflict in the exercise of their functions. A particular citizen owes allegiance to the federal government in national matters alone. In all other matters he is under the control of his own State. There is ordinarily no appeal in local affairs from the State to the national government. The decisions of the State courts on matters pertaining to those affairs are supreme so long as they do not encroach upon the powers delegated to the United States or violate the United States constitution. In other words, the State is not a mere instrument of government established by and under the control of the federal government, but is an independent political organization, equally as permanent, equally as supreme in matters within its jurisdiction, as the general government itself.

§ 22. **Sovereignty in the United States.** It is a fundamental theory in the United States that sovereignty is in the people; that all governmental powers reside primarily in the whole body of United States citizens.<sup>14</sup> This sovereign body, however, exercises

12. An *ex post facto* law is one which acts retrospectively, making a certain deed criminal which was not so when it was performed. See 8 Cyc. 1027.

13. See *infra*, § 40.

14. "The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign, and must be exercised in subordination to the States, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the constitution was, indeed, selected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might 'be submitted to a convention of delegates chosen in each State by the people thereof, under the recommen-

dation of its legislature, for their assent and ratification.' This mode of proceeding was adopted; by the convention, by congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely on such a subject,—by assembling in convention. It is true, they assembled in their several States; and where else would they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one mass. Of consequence, when they act they act in their States. But the measures they adopt do not on that account cease to be the measures of the people themselves, or become the measures of the State governments.

"From these conventions the constitution derives its whole authority.

its power of governing only through its agents or officers. These officers are selected directly or indirectly by the vote of the people. Once elected, they generally have an independent tenure of office for the period for which they are chosen. They are not merely servants, but agents or representatives of the people. Sovereignty is not delegated to them. That always remains with the people. That which is delegated is the immediate power of exercising certain governmental functions. These officers represent the sovereign body; they do not become sovereign themselves.

§ 23. *Distribution of Powers in United States.* The federal government exercises its powers under the constitution as follows: (1) Legislative powers are exercised by a congress consisting of (a) a senate, composed of two senators from each state chosen by the state legislatures; (b) a house of representatives, composed of members elected directly by the people. (2) Executive powers are exercised by a president and his subordinate officers. (3) Judicial powers are exercised by the supreme court, created by the constitution, and by subordinate courts, created by congress.

Under the federal constitution, the national government exercises its powers through three general departments, corresponding in name and character to the three branches of government which we have mentioned in a previous chapter.<sup>15</sup> As stated above, the legislative powers are exercised by a congress, which consists of two distinct bodies, known, respectively, as the senate and the house of representatives. The executive power is vested in a president of the United States and his subordinate executive officers. The judicial power is vested in a supreme court of the United States and in such inferior courts as congress may, from time to time, ordain and establish.

*The Senate.*—The senate is sometimes referred to as the upper house of congress. At the time of the formation of the constitution, there was some difference of opinion as to whether the members of the national legislature should be chosen by the States as such, or by the people directly, without the intervention of the State governments. One of the results of this discussion was the provision that the senate should be made up of two senators from each state, chosen by the legislatures thereof, and this provision was accompanied by a constitutional guaranty that "no State, without its consent, shall be deprived of its equal suffrage in the senate."

The government proceeds directly from the people, is 'ordained and established' in the name of the people, and is declared to be ordained 'in order to form a more perfect union, establish justice, insure domestic

tranquillity, and secure the blessings of liberty to themselves and their posterity.'" *McCulloch v. Maryland*, 4 Wheat. 316.

15. See *supra*, § 16.

*The House of Representatives.*—Unlike the senate, the members of the lower house are elected by a direct vote of the people; and, for the purpose of securing a proper distribution of representatives, each State is divided into what are called “congressional districts,” each district electing one representative. The lower house being the direct representatives of the people, the constitution provides that it shall have “exclusive power to originate all bills for the purpose of raising revenue.”

*The President.*—The president is the chief executive officer of the United States government, and as such controls the practical administration of the laws. In addition to his executive functions, however, he plays an important part in legislation. When a bill has passed both houses of congress, it is necessary that it receive his approval before it can become a law, unless, after he has declined to approve it, it be again passed by a two-thirds vote of both houses.<sup>16</sup> This power of the president is called the “veto power,” because he communicates his refusal of assent to any law by writing upon it the word “Veto,” meaning “I forbid.” The president also has the power, by and with the advice of the senate, to appoint the justices of the various courts of the United States, as well as many of the subordinate executive officers.

*The Supreme Court.*—The supreme court is the highest court of appellate jurisdiction in the federal system, and is supplemented by various subordinate courts, the nature of which will be explained in a subsequent chapter. One of the most characteristic functions of the supreme court is of a quasi-legislative character. In it is vested the power of determining whether the laws passed by congress or any State legislature are in harmony with the federal constitution or not. If congress or a State legislature pass any law in excess of its powers, or in any way conflicting with that constitution, such a law is called an “unconstitutional law,” and is void.

§ 24. *The State Governments.* The state governments have inherent in themselves all power, except so far as they are limited by their own or the federal constitution. As to all matters not delegated to the federal government, each State adopts its own system of laws and institutions, the only control upon it being that growing out of the constitutional provision that “the United States shall guarantee to every state in this Union a republican form of government.” Consequently, although there is considerable uniformity in the governmental systems of the various States, yet on many points there is also much diversity. It is not within

16. If, however, a bill passed by congress be neither vetoed nor approved by the president within ten days after its passage, it becomes a law without his approval.

the limits of the present work to discuss these differences between the various State systems, but merely to mention some features which are common to all the States.

A State constitution differs radically in its character from the federal constitution. We have seen that the federal constitution is chiefly made up of a grant of powers to the federal government, and that the federal government is limited to the powers given it, either expressly or by implication, by that instrument. In other words, the federal government has no powers whatever except such as are given it by the federal constitution. The State governments have inherent in themselves, however, all power, except so far as they are limited by either the federal constitution or their own. A State constitution, therefore, has for its object the limitation of the powers which the States would otherwise have, while the federal constitution grants to the federal government powers which it would not otherwise possess. An act of congress must not conflict, as we have seen, with the constitution of the United States. A law passed by the State legislature must be put to the test of conformity with (1) the constitution of the United States; (2) with the laws passed by congress; (3) with the treaties entered into by the United States government, which are in the federal constitution declared to be part of the supreme law of the land; and (4) with the constitution of the particular State.

The power of determining whether a State law is or is not in conflict with the State constitution is vested in the highest court of appellate jurisdiction in the State, usually called the "supreme court" of the State; but if its conformity with the federal constitution, laws, or treaties be questioned, and the State courts decide that it is not in violation thereof, the matter may be taken to the United States supreme court for final decision.<sup>17</sup>

In all the States the legislature consists of two bodies, corresponding in their general nature to the national senate and house of representatives. The number of members both in the upper house and in the popular branch varies greatly in the different States. The members of both houses are chosen by popular vote.

The chief executive officer is in every State called the "governor," and his term of office varies in the different States from

17. The federal constitution itself provides that "the constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby,

anything in the constitution or laws of any State to the contrary notwithstanding." Const. art. 6. Therefore any State law which is inconsistent with a law or treaty of the United States is inconsistent with the United States constitution, which declares such laws and treaties to be part of the supreme law of the land.



one to four years. In most States the governor possesses the power to veto any act of the legislature, but in the States of Delaware, North Carolina, and Rhode Island no such power is vested in him.

The federal constitution contains various limitations upon State action. These will be shown in a subsequent chapter.

**§ 25. Local Self-Government.** For the purpose of local self-government, the States have divided their territory, and created subordinate political bodies, such as villages and cities, to act as agencies of the State in the local government of particular districts. All the subordinate political bodies created for this purpose, whether in the form of villages, cities, counties, or towns, etc., are called "municipal corporations," or "quasi municipal corporations." This plan of local self-government through public corporations is a natural consequence of the theory of sovereignty in the people. If the people are sovereign, they have a right to govern themselves,—to have home rule. A municipal corporation is a corporate institution, established by a State as an agency of the State in the local government of particular districts. By a corporate institution or body corporate is meant, as we shall hereafter see, a collection of individual persons who are organized in such a way that a legal personality results distinct from the members who compose it.<sup>18</sup> This legal personality is possessed of a corporate name by which it is known, and it continues to exist in spite of changes by death or otherwise in its membership. A corporation may also be formed, as we shall see hereafter, for the conduct of private business. It is then called a "private corporation"; but we are at present interested in those only which are formed for governmental purposes.

There are three different types of local government in vogue in the United States. In the first, or New England type, which is peculiar to the six New England States, the town is the political subdivision of primary importance. Through its agency the

18. The exact nature of a corporation can be best understood by an illustration. Let us suppose that five persons wish to begin the conduct of a certain business, and think it desirable to do this in the form of a corporation. They agree among themselves to purchase a certain percentage of the stock of the corporation as soon as formed. When the corporation is organized according to law, the five members or stock-holders do not become identified with the corporation, but are merely in business relations with it. They are

stock-holders in it, and as such entitled to their share of the profits produced by it, but the corporation is something distinct from them. And so it is with a public corporation. Every citizen is in one sense a member of it, and yet he is not identified with it. The corporation continues to exist, even though he may die or move out of its jurisdiction. The corporation, whether public or private, is, for most purposes, a legal entity. It can act only through its agents or officers.

ordinary functions of local government are exercised. In these States there are counties, it is true, but they are little more than judicial districts. The second type, which has been adopted chiefly by the southern States, makes the county the important political unit, while the town or township is assigned to a secondary place. The third type, which is adopted by most of the northwestern States, is a compromise between the "town" and "county" plans. Here both the county and the township are important elements, the local governmental powers being vested in both. For the government of the more thickly populated districts, each of the States has adopted a still different and more complicated system — that of the city and village; the former in the larger urban localities; the latter in the smaller. Again, for educational purposes, the counties or townships are also divided into school-districts. To incorporated cities and villages, it is customary to apply the name "municipal corporations"; while counties, school-districts, etc., are usually classed as "quasi-corporations."<sup>19</sup>

All public corporations are the creatures of the State. The State legislature may change or even abolish them at will.

§ 26. **Citizenship and Naturalization.** Under the Articles of Confederation, there was no such thing as citizenship of the United States. Citizenship was a State matter exclusively. In the constitution, however, citizenship of the United States is repeatedly referred to; and in the fourteenth amendment, State citizenship is also mentioned. No person can be a citizen of any State unless he is also a citizen of the United States.<sup>20</sup> If, however, he is a citizen of the United States, he becomes, by virtue of such citizenship, a citizen of the State in which he resides.

Citizenship in the United States may be by nature or by naturalization. Citizenship by nature is the result of birth within the territorial limits of the United States, and subject to the jurisdiction thereof. The process of naturalization is available to free white persons and to persons of African nativity or descent.<sup>21</sup> Naturalization is covered by the following rules: (1) The applicant must declare on oath two years prior to his admission that it is his *bona fide* intention to become a citizen of the United States, and that he renounces all allegiance to foreign powers. (2) At the time of his admission, he must have been for five years a resident within the United States, and at least one year in the State or territory where he is admitted. (3) He must renounce

19. See 28 Cyc. 117.

20. Cooley Const. Law 244.

21. U. S. Rev. St. § 2169. By special treaties, members of certain Indian tribes have been accorded the

privilege of becoming citizens. Such a treaty was entered into with the Choctaws in 1830 and with the Cherokees in 1836.

any title of nobility which he may possess. (4) He must declare on oath that he will support the constitution of the United States. (5) The country from which such alien comes must not, at the time he seeks to be naturalized, be at war with the United States. (6) The applicant must be a person of good moral character. (7) Minor children of naturalized citizens are citizens of the United States, if they reside within the United States at the time of the naturalization of their parents.<sup>22</sup>

22. See 2 Cyc. 110 *et seq.*

## CHAPTER III

### SOURCES OF THE MUNICIPAL LAW — UNWRITTEN AND WRITTEN LAWS

- § 27. Sources of the Law in General.
- 28. The Unwritten Law in General.
- 29. The Civil or Roman Law.
- 30. The Common Law and Its Sources — Customs — Stare Decisis.
- 31. Development of the Common Law — Fictions — Equity.
- 32. The Law Merchant.
- 33. The Canon Law.
- 34. The Common or Unwritten Law in the United States.
- 35. Equity — Courts of Equity and their General Jurisdiction.
- 36. Specific Character of Equity Jurisdiction.
- 37. The Maxims of Equity.
- 38. The Written Law in General.
- 39. Relation of the Written to the Unwritten Law.
- 40. The Constitution of the United States.
- 41. Acts of Congress.
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- 43. State Constitutions.
- 44. Acts of State and Territorial Legislatures.
- 45. Municipal Ordinances or By-Laws.
- 46. Enactment of Statutes.
- 47. Constitutionality of Statutes.
- 48. Affirmative and Negative Statutes.
- 49. Declaratory and Remedial Statutes.
- 50. Public and Private Statutes.
- 51. General and Local Statutes.
- 52. Mandatory and Directory Statutes.
- 53. Prospective and Retrospective Statutes.

§ 27. Sources of the Law in General. The sources of the municipal or positive law in the United States are: (1) The common or unwritten law of England as it existed at the time of the separation of the American colonies; (2) certain English statutes of general application enacted prior to that time; (3) the law administered in the English courts of equity; (4) the constitution of the United States and amendments thereto; (5) acts of the congress of the United States enacted in pursuance of the power conferred by the constitution; (6) treaties made between the United States and foreign nations under the authority conferred by the constitution; (7) the constitutions of the several States of the Union; (8) acts of the legislatures of the several States and Territories of the United States; (9) ordinances or by-laws

enacted by the legislative bodies of municipal corporations under authority conferred by the legislature of the State; and to some extent (10) the civil or Roman law, and (11) the canon law.

§ 28. **The Unwritten Law in General.** All important systems of municipal law are made up of two elements, known, respectively, as the "unwritten law" and the "written law." The unwritten law of any country is that portion of the municipal law of that country which is not formally prescribed by the legislative branch of government or embodied in a written constitution, while the written law is that part which is expressly laid down by the legislature or adopted in express terms as the constitution of the state.

Not all municipal law is actually prescribed by the legislature of the state. That body, it is true, may make any law it sees fit, unless restricted by constitutional rules. But the law must have principles to govern every condition in which men are placed, and every relation which they bear to other men. When the complexity of modern civilization is considered, it becomes plain that these principles must be of an almost infinite variety and number. No legislature could, unless gifted with superhuman energy and foresight, prescribe laws to meet every state of facts which might arise within its jurisdiction. It will be found, therefore, that only a small proportion of the laws of any country are laid down directly by the law-making body. We may therefore divide the municipal law of any state into two kinds: (1) The written law, which is the direct result of legislation; and (2) the unwritten law, which is derived from other sources.

It is not to be understood that the unwritten law is at all times strictly without written form. It receives its name because it was not originally written. When a legislature passes a law, it is immediately recorded, and usually published in exact words, before it takes effect. Such a law is therefore in the strictest sense written. With laws of the other class, however, it is not necessary to their operation that they should be recorded at any time, and they are seldom written down except in the reports of judicial decisions and in the works of commentators.

The place of the unwritten law in the legal system is not difficult to understand. Courts,<sup>1</sup> which are the instruments used by the judicial power in the exercise of its functions, may be said to be the mediators between law and fact. They are first confronted with a state of facts, to which they must apply some legal rule.

1. A "court" is said by Blackstone to be "a place where justice is judicially administered." Its power to hear cases and judicially determine them is called its "jurisdiction." And see *infra*, § 248.

In a large majority of cases the legislative power has furnished no rule governing the case. But the courts do not deny justice to the suitors on that account. They reason that the sovereign body must have contemplated a rule for every case, and that such a rule, when not prescribed by the legislature, must be looked for elsewhere. In determining the proper rule to apply to the particular case, the courts look for guidance to the unwritten law.

§ 29. **The Civil or Roman Law.** The term "civil law" is sometimes used to designate what we have described as the "municipal law," and sometimes to designate that division of the municipal law which relates to civil rights and remedies, as distinguished from criminal law. In its more particular significance, however, it means that body of the law known as the Roman law, as distinguished from the law of England, and particularly from the common law, hereinafter explained; and in that sense it is used here.

Two great systems of unwritten law have been developed in the history of the Aryan races: the civil law of ancient Rome and the common law of England. The laws of every civilized nation of Europe and America are based upon one or the other of these two systems.<sup>2</sup> The civil or Roman law (*jus civile Romanorum*), in its general sense, includes all the laws that were in force in Rome at any time during its history. But the term "civil law" is usually applied in a more restricted sense to that system which is embodied in the compilations made in the reign of the Emperor Justinian, during the sixth century A. D.

In the form in which it comes down to us, the Roman law, being codified, must be regarded as a system of written law. But in this condition it is merely the crystallization of that which it took centuries to develop, and until it reached this final form the unwritten law was its most important element, as it must needs be in any desirable legal system. The growth of the Roman law begins with the beginning of Roman history. Its first authentic records are the laws of the Twelve Tables, which, although established as early as the year 450 B. C., yet were regarded as the foundation of the Roman law until the time of Justinian. The first five centuries of the christian era constituted the period during which the civil law was molded into the form in which we find it in Justinian's reign. It seems to have been chiefly made up of (1) the constitutions, or decrees and edicts and authoritative commands of the emperor; (2) the acts of the senate; (3) the laws of the people (*plebiscita*), passed in the popular assembly; (4) judicial decisions; (5) the judgments of magistrates;

2. As to the common law see *infra*, § 30.

and (6) the *responsa prudentium*, or the opinions and writings of jurists.<sup>3</sup> Previous to the reign of Justinian, the Roman laws had several times been reduced to the form of a code. The principal compilation of this kind was that of Theodosius, in the fifth century A. D. But to Justinian we are indebted for the final compilation of the laws into a code so systematic and perfect that it is still regarded, after the lapse of nearly fourteen centuries, as a most magnificent monument of legal reason.

It is a striking fact that not one of the nations on the continent of Europe has produced an independent legal system. The states which composed the Holy Roman empire, regarding themselves as the legitimate successors of the Roman name and dignity, naturally held to the Roman law. And the other nations which had at one time or another been subject to the Roman arms, adopted the civil law as their inheritance when the Roman empire fell. The civil law, in the form given it by the compilation or codification of the Emperor Justinian, lies at the base of the legal systems of all of the nations of continental Europe and of countries colonized by them.

### § 30. The Common Law and its Sources — Customs — Stare Decisis.

The common law is that system of unwritten law which grew up in England, and forms the basis of the English legal system. England has the distinction of being the only nation of modern times which has evolved an independent system of unwritten law. The early English lawyers were accustomed to regard this system as of high antiquity, sometimes asserting that it was as old as the native Britons. But Blackstone justly remarks that to the ancient British laws were added many of the customs of the Romans, the

3. The Justinian Code consists of the following compilations: (a) The Early Code. Justinian first ordered a compilation of the imperial constitutions. This compilation, called the "Codex Vetus," or "Early Code," was completed and promulgated as law in the year 529 A. D. None of it has been preserved. (b) The Pandects or Digest. The Early Code having been completed, Justinian next appointed sixteen persons to revise and codify the entire civil law with the exception of the constitutions. This work was completed in three years, and the New Code was published in 533 in fifty books under the title "The Pandects." (c) The Institutes. These consisted of a still later work, also published in 533, designed as a text-book for the study of the law. It was hardly more than a revision of the work of

an earlier jurist named Gaius. Although it was primarily an elementary treatise, yet it was of equally binding force upon the people as the more pretentious works. (d) The New Code. This was a revision of the Codex Vetus, made desirable by the large number of new constitutions promulgated by Justinian since the compilation of that work, and it was published in 534. (e) The Novels. After the publication of the New Code, Justinian still continued to issue constitutions in such number that, upon his death, a separate collection of them was made. Many of them created material changes in the previously existing law. The new collection was published under the name of the "Novellae Constitutiones," or "New Constitutions." They are now usually referred to as the "Novels."

Picts, the Saxons, the Danes, and the Normans, "thereby, in all probability, improving the texture and wisdom of the whole by the accumulated wisdom of divers particular countries." At about the beginning of the eleventh century there seem to have been three different systems in vogue in the kingdom: (a) The Mercian laws; (2) the West Saxon laws; and (3) the Danish laws, —each having its distinct territory where it was observed. It is said that out of these three systems King Edward the Confessor extracted a uniform system which was thereafter observed throughout the whole kingdom. To this system, because it was of such general scope, the name "common law" was applied.

The most important source of the common law lies in those customs which, growing up in a community, and becoming crystallized by time, are regarded as of legal force in the absence of more authoritative rules. By the common-law doctrines, a rule of law, whether based upon custom or not, when once recognized by the courts and applied to a case, forms a precedent, and should be followed in all similar cases thereafter, unless flatly absurd or unjust, or unless repealed by legislation. This is called the "doctrine of *stare decisis*."

In legal theory, a custom, to be entitled to recognition as law, must have been: (a) In existence for time immemorial. It must, in the quaint words of Blackstone, "have been used so long that the memory of man runneth not to the contrary." (b) It must have been continued; that is, it must have been constantly observed whenever an occasion for its observance arose. It must not have given place to other customs inconsistent with it. (c) It must have been peaceable; that is, it must have been acquiesced in without dispute. (d) It must be reasonable; that is, it must not be inconsistent with the general spirit of the law. (e) It must be certain; in other words, it must not be vague or indefinite in its character. (f) It must have been compulsory; that is, it must have been regarded as binding upon all persons to whom it applies. (g) It must be consistent with all other customs.

Whenever the written law failed to provide a rule to govern a case, the common-law judges were expected to take the necessary rule from the customs of the community. The recognition of the legal force of custom is a practical recognition of the right of the people to be consulted in the making of the laws. Such recognition is very infrequent, except in those countries where the people have attained more or less practical freedom. It is in itself a step toward liberty.

Early in the history of the common law the courts began to preserve records of their decisions, and it became habitual, when the unwritten law was to be resorted to, for the judge to examine



the reports of previous cases to see if the same matter had not already been considered judicially. It was much easier to do this than to go through the process of determining what the custom was directly. This habit of the judges itself grew into a custom, and finally it became a rule with the courts that the decisions in previous cases should govern whenever they were applicable to the case in hand. This rule gave greater certainty to the law. The people might know, from what had already been decided, the rule which would govern their own actions. The reported decisions have become so numerous that at the present time original customs are resorted to so infrequently that modern lawyers often forget that they are the basis of the common law. It may be said that the common law is embodied in the cases, and, when a state of facts arises for which there is not a precedent, there is usually some general principle running through the law from which a rule may be deduced, or a case from which a rule may be extracted by analogy. Evidence of a custom which has not already been judicially recognized is seldom resorted to. The authority of adjudicated cases tends more and more to exclude all other sources of authority as time goes on.

§ 31. **Development of the Common Law — Fictions — Equity.** The development of the common law has been materially aided by the use of legal fictions, and by the system known as "equity." A legal fiction is the assumption by a court that certain things are true which are in reality either partially or wholly false. Equity is a supplementary legal system, which, by reason of the elasticity of its rules, serves to correct the tendency toward undue harshness resulting from the inflexibility of common-law principles.

Whenever rules become fixed, growth ceases. But it is desirable that a system of law should keep pace with the growth and civilization of the race which it governs. In the history of the common law there have been many times when principles have been outgrown, as it were, by the people to whom they applied. The courts recognized this, yet the rules were so firmly rooted in the law that it would be well-nigh revolutionary to uproot them. Legal fictions were resorted to. For example, at the common law, there was a form of action called "trover," which lay for the recovery of damages against a person who, having found the goods of the plaintiff, refused to give them up when asked to do so. But cases would come up in which the defendant had the goods of the plaintiff, and refused to give them up, but in which the defendant had not found the goods, but had become possessed of them in some other way. The essence of the action of trover was the finding of the goods. Should the judges turn the suitor away because it happened that the defendant had perhaps stolen the

goods instead of finding them? No; the judges said that they would assume that he found them, whatever the real facts were, and would give the plaintiff damages if he could prove that the defendant had wrongfully converted the goods, and would not deliver them to the rightful owner. And to this day an action of trover proceeds upon the fiction that the goods were originally found. The rationale of fictions is this: The law first becomes so fixed that its modification is impracticable, although extremely desirable. The judges note the desirability of certain changes, and, by assuming a state of facts which does not in fact exist, bring those changes about. While the dry, hard shell remains the same, the spirit within is changed to meet the demands of the times.

The existence of an equity system in England is also due to a realization of the inflexibility which is characteristic of a rule of law when it once takes upon itself a permanent form. A similar system was developed in Rome, and we may regard it as necessary to the attainment of the fullest justice that some equitable rules exist in any collection of laws. The name "equity" implies that the design of the system is justice; but it is not every man's idea of justice that will be administered under the system. It is rather the technical justice of the courts, which is governed by rules nearly as rigid as those of the common law proper. The equity system will be discussed at length in subsequent sections.<sup>4</sup>

§ 32. **The Law Merchant.** The "law merchant" is the name applied to a collection of customs which were observed by merchants and other business men in their dealings with each other. They are now regarded as fully adopted into the common law. They consist chiefly of the law in relation to commercial paper.

It is a principle of the common law that particular usages are frequently to be recognized and enforced, although they may even be contrary to the ordinary legal rule. This principle sometimes goes so far as to lead the courts to change the ordinary meaning of words to conform with a certain usage. These usages may be local — that is, confined to a certain locality — or they may apply to a particular class of persons. The law merchant was of the last-mentioned class. It was a system of customs which were often contradictory to the regular common-law rules, and which, nevertheless, the courts would enforce in controversies between merchants who were in the habit of observing them. As time advanced, however, they became gradually grafted into the common-law system, until to-day they are as much a part of the common law as are any of that system's principles. The adoption of these customs into the common law is a fair example of the way custom

4. See *infra*, § 35 *et seq.*

develops into law; first perhaps as a mere particular usage, then becoming general in its character, and finally receiving recognition as law from the legal tribunals.

§ 33. **The Canon Law.** The canon law was that part of the Roman law system which governed ecclesiastical affairs. It is used by the English ecclesiastical courts in the administration of their judicial functions, and may in a sense, therefore, be regarded as having been adopted into the common law. In its original form, as a part of the Roman law, the canon law was in the main a written system. But it is hardly necessary to say that it does not derive its authority in England by virtue of its promulgation by a foreign power. It is administered in the English courts in the same manner as ordinary unwritten law, its Roman law form being regarded as merely furnishing evidence of what the law is. As the law merchant is a collection of customs previously existing which have been adopted bodily into the common law, so the canon law is a system of laws which have been adopted *in toto* by the English courts.

§ 34. **Common or Unwritten Law in the United States.** The English common law is adopted, so far as suited to American institutions, as the unwritten law of all of the States of the United States except Louisiana. In that State, except in criminal matters, the Roman law prevails. In their character of English colonies, those States which afterward organized the United States government were subject to the English common law. Many of the colonists were emigrants from England, and were therefore accustomed to that system even before they came under its control in America, so that at the time of the Revolution the people of the colonies knew no laws except those which came to them as a birthright from their fatherland. It was but natural that they should continue the same system to which they had been accustomed, for a change in a system of laws is a far more serious matter, more difficult to accomplish, and more grave in its results, than even a change of governmental forms. Therefore, when America was settled by the English colonists they brought with them the English common or unwritten law, except in so far as it was inapplicable to their new surroundings and conditions.<sup>5</sup> This exception is very important. The courts have frequently had occasion to hold that particular rules of the common law were not a part of our law, simply because our new conditions rendered them inapplicable.<sup>6</sup> The colonists also brought with them such existing English statutes as were applicable to our new conditions and even adopted some other English statutes as they were subse-

5. See 8 Cyc. 366 *et seq.*

6. See 8 Cyc. 377.

quently enacted.<sup>7</sup> Thus the law of England, common and statute, in force prior to the Revolution, so far as it was applicable to our conditions, but no further, became the common law of the American colonies and was adopted by the several States of the Union after the Revolution, either by general consent or by express constitutional or statutory provision. This body of the law is still in force in the several States except in so far as it has been abrogated or changed by statute; and it has also been adopted by the new States as from time to time they have been admitted into the Union.<sup>8</sup>

In like manner the law merchant, which, as we have seen, was recognized as a part of the English common law,<sup>9</sup> became by adoption, so far as applicable, a part of our common law.<sup>10</sup>

In Louisiana, that State having been a French province up to the time of its admission into the Union, and therefore having been subject to the Roman law<sup>11</sup> in its French form, the same reasons which led the other States to adopt the common law induced the people to adopt the Roman system as the basis of their laws. In criminal matters, however, the common law has been expressly adopted in that State. Traces of Roman law influence are also apparent in Florida, Texas, California, and other southern and western States.

Owing to the total separation of church and State in this country, the canon law,<sup>12</sup> as a system, is of no legal force in the United States, although some of its principles have been adopted into our common law. For example, the law forbidding adultery has been adopted from the canon law, as administered by the English ecclesiastical courts, into the common law of many of the States.<sup>13</sup>

*With Respect to the Federal Government.*—The federal government does not possess a complete unwritten legal system. There is no common law of the United States as distinguished from the individual States. The federal government is composed of independent States, each of which has its local usages, customs, common law, constitution and statutes, but there is no principle which pervades the Union and has the authority of law that is not embodied in the constitution of the United States or in an act of congress passed in pursuance thereof. But a court of the United States, when it has jurisdiction of a cause under the constitution and acts of congress, enforces the common law of the State in which it is sitting; and it will also construe the constitution and acts of congress in the light of the common law.<sup>14</sup>

7. See 8 Cyc. 370.

8. See 8 Cyc. 377-383.

9. See *supra*, § 32.

10. See 8 Cyc. 372.

11. See *supra*, § 29.

12. See *supra*, § 33.

13. See 1 Cyc. 952; 19 Cyc. 1435.

14. See 8 Cyc. 385.

When the federal courts are called upon to decide a case to which no written laws apply, they distinguish between matters of local law and matters of general law. If the case involves a matter of local law, they are guided by the law as it exists in the State where the cause of action arose. If it involves a matter of general law, they exercise an independent judgment, and are not bound by the decisions of the local courts.<sup>15</sup>

*In the District of Columbia and the Territories.*—The common law and early English statutes which were adopted by the constitution of Maryland are, by act of congress, in force in the District of Columbia, except in so far as they have been abrogated by act of congress; and as a rule, by express adoption, the common law is made the rule of decision in the courts of the territories of the United States except so far as it is inapplicable or inconsistent with acts of congress or of the territorial legislature.<sup>16</sup>

15. The thirty-fourth section of the Judiciary Act of 1789 provides that: "The laws of the several States, except where the constitution, treaties or statutes of the United States shall otherwise recognize or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." In the leading case of *Swift v. Tyson*, 16 Pet. 1, Story, J., settled the construction of that section in the following words: "In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the thirty-fourth section limited its application to State laws strictly local; that is to say, to the positive statutes of the State, and the construction thereof by the local tribunals, and to rights and titles to things having a permanent locality, such as rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reason-

ing and legal analogizing what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not apply to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence." See also *Railroad v. Baugh*, 149 U. S. 368, 13 S. Ct. 914; *Burgess v. Seligman*, 107 U. S. 20, 2 S. Ct. 10; *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Hough v. Railroad Co.*, 100 U. S. 213.

16. See 8 Cyc. 386.

The common law is adopted in Hawaii, except as otherwise expressly provided by the constitution or laws of the United States and by the laws of the Territory of Hawaii, or fixed by Hawaiian precedent, or established by Hawaiian usage. Hawaii Rev. Laws (1905) § 1.

In Porto Rico and the Philippine Islands the existing laws, which were based on the civil law in force in Spain, have been continued in force by act of Congress, except as altered, etc. 31 U. S. St. at Large, p. 79, § 8; 12 *Encyclopædia Americana*, "Philippine Islands."

*Christianity.*—It has been said that Christianity is a part of the common law; but this is true in the United States only in the sense that the institutions and essential truths of the Christian religion are entitled to profound respect and are protected by the common law against public reviling and blasphemy.<sup>17</sup> "If Christianity is a law of the State," said an Ohio judge, "like every other law, it must have a sanction. Adequate penalties must be provided to enforce obedience to all its requirements and precepts. No one seriously contends for any such doctrine in this country, or, I might almost say, in this age of the world. The only foundation—rather, the only excuse—for the proposition, that Christianity is part of the law of this country, is the fact that it is a Christian country, and that its constitutions and laws are made by a Christian people."<sup>18</sup>

§ 35. *Equity—Courts of Equity and their General Jurisdiction.* The English equity system was administered by a court known as the "High Court of Chancery." In this country, equity jurisdiction is in some States vested in a distinct court. More frequently it is exercised by the same tribunals which administer the common law, such tribunals sitting as courts of law and courts of chancery alternately. In some states, however, the distinction between actions at law and suits in equity has been abolished. Both in England and in this country it is a rule that the chancery or equity courts have jurisdiction only in cases for which the ordinary law courts furnish no adequate remedy.

In order to understand the precise nature of equity as it exists to-day, it will be necessary to refer briefly to the conditions under which the English court of chancery arose, and to trace its development until it became an established factor in the judicial system of that country. In the year 1066, William the Conqueror ascended the English throne. His rule was firm. We would regard it at the present time as despotic. One of the doctrines which he asserted and acted upon was that the king was the

17. See 8 Cyc. 371.

18. Board of Education v. Minor, 23 Ohio St. 211, 246, 13 Am. Rep. 233. In an earlier case it was said: "We have no union of church and State, nor has our government ever been vested with authority to enforce any religious observance, simply because it is religious. Of course, it is no objection, but on the contrary, is a high recommendation, to a legislative enactment, based upon justice or public policy, that it is found to coincide with the precepts of a pure religion; but the fact is nevertheless true, that the power to make the law rests in the legislative control over

things temporal and not over things spiritual. Thus the statute upon which the defendant relies, prohibiting common labor on the Sabbath, could not stand for a moment as a law of this State, if its sole foundation was the Christian duty of keeping that day holy, and its sole motive to enforce the observance of that duty. . . . We are to regard the statute under consideration as a mere municipal, or police regulation, whose validity is neither strengthened or weakened by the fact that the day of rest it enjoins is the Sabbath day." Bloom v. Richards, 2 Ohio St. 387, 391.

fountain of all justice; that the courts of the country were limited at all times by the royal will. Under this doctrine, William and the kings who followed him often personally dealt out justice irrespective of the courts. The common-law courts were at this time limited very strictly in their jurisdiction. Certain forms of action were in use, but, unless a person's wrong was of such a nature that one of these actions applied to it, the courts were powerless to grant a remedy. These forms of action were neither comprehensive nor flexible; and many suitors, after they had been refused justice when they applied for it to the courts, would at last appeal to the king, in his character of fountain of justice, for relief. The most important of the king's great officers was the chancellor. He was an officer of the church, the king's confessor, and the keeper of the great seal of the kingdom. He was also said to be the keeper of the king's conscience, and, moreover, had certain duties in connection with the law courts. As the confidential adviser of the king, he was undoubtedly at all times consulted in regard to the petitions of subjects who wished the king to exercise his extraordinary legal powers in their behalf. And when these suitors became so numerous that the king was unable to attend to their complaints in person, the entire charge of these matters was turned over to the lord chancellor; and that personage soon became the chief officer of an important court in which these petitions were heard and determined, viz. the chancellor's court, or the court of chancery.<sup>19</sup>

In rendering his judgments the chancellor was at first bound by no rules except such as his conscience dictated, unless there were statutes applicable to the cases. But he was, as we have seen, an ecclesiastic, and as such was educated in the principles of the Roman law. Very naturally he found in that system many rules to determine him in his decisions; hence we are accustomed to regard the equity system as being more indebted to the Roman law than to any other source. Still the chancellor did not feel bound to observe its principles unless they were consonant with his own ideas of justice. From the fact of the extraordinary character of the wrongs which the court of chancery assumed to redress, there was much less chance for the application of the doctrine of *stare decisis*,<sup>20</sup> or precedent, in the equity system than in the common law. The decisions of the successive chancellors were reported, however, and they appear to have felt themselves bound by the prior decisions of the court whenever cases arose to which they applied. There thus grew up an extensive system of law supplementary in its character to the common law proper. The jurisdiction of the chancery court tended to broaden as

19. See 16 Cyc. 23.

20. See *supra*, § 30.

common-law rules grew more and more inflexible on account of the rigid adherence to precedent on the part of the judges who administered them. This tendency gave rise to a feeling of jealousy on the part of the common-law judiciary, who succeeded in procuring the passage of a statute extending their own jurisdiction, so that it was not limited to the precise actions to which it had previously been confined, but could be exercised in all similar cases; and as the old theory that the chancellor was the representative of the king in his capacity of fountain of justice began to lose ground, and it became less presumptuous to limit his jurisdiction, it became a recognized rule that the court of chancery could not be resorted to except in cases where the ordinary common-law courts gave no adequate remedy. This is now one of the fundamental rules of the equity system.<sup>21</sup>

The system of equity was adopted in most of the States of the United States substantially as it was administered by the English court of chancery.<sup>22</sup> Jurisdiction in equitable as well as legal causes is conferred upon the courts of the federal government by the United States constitution. But the federal judicial system did not and does not maintain a separate chancery court. It has seemed wise to allow the common-law judges to administer equitable remedies as well as to dispense strictly legal relief, not discarding the equity procedure nor equity principles, but applying them at stated times when they sit as chancery judges. Thus it will be observed that the same court will at one time be styled the "Circuit Court of the United States," and at others the "Circuit Court of the United States, in Equity." This plan is adopted by about half of the States of the Union.

The abolition of the distinction between actions at law and equitable suits has been brought about in those States which have adopted what is known as the "Code Procedure." Under that system there is allowed ordinarily only one form of action, which applies to every case, whether of a legal or equitable nature. This change usually applies, however, to the remedy merely, and it should by no means be understood that its effect is to abolish the equity system. Most equitable doctrines are applied under the codes as fully as they were in the old English chancery court.<sup>23</sup>

21. See 16 Cyc. 23, 30. The chancellor began to exercise judicial authority in the reign of Richard II, but it was not until the time of Henry VI that his decisions began to be reported. See 2 Reeves History of the English Law 466, 600.

22. See 16 Cyc. 23, 25.

23. See 16 Cyc. 24-30. Separate courts of chancery exist in the States

of Alabama, Delaware, Maryland, Mississippi, New Jersey, and Tennessee. Equity jurisdiction is exercised by the common-law courts in conformity with chancery rules in Arkansas, Florida, Georgia, Illinois, Iowa, Kentucky, Maine, Massachusetts, Michigan, New Hampshire, North Carolina, Oregon, Pennsylvania, Rhode Island, Texas, Vermont,



§ 36. *Specific Character of Equity Jurisdiction.* Although the rules of equity depended originally to a large extent upon the sense of justice entertained by the chancellor, at the present time the equity judges are limited in their discretion by a large body of rules and maxims. They are practically as much restricted in their powers as are the judges of the courts of law, although their remedies are of a kind more easily adjustable to the circumstances of particular cases. The larger proportion of equitable cases are those in which property rights are involved. Equity has no jurisdiction whatever in criminal matters. The jurisdiction of the equity courts is said to be, as to some matters, exclusive of common-law jurisdiction, as to others concurrent with it, and as to some merely auxiliary to it.<sup>24</sup>

This last proposition may seem inconsistent with the principle that equity powers are confined to cases to which the law courts are unable to apply an adequate remedy. But the inconsistency disappears when emphasis is laid upon the fact that the common-law remedy must be adequate if the equity courts are to have no jurisdiction. On many matters — as those growing out of fraud — both common law and equity may be resorted to, the choice of the suitor depending upon whether he is content with a mere award of damages or feels himself entitled to relief of an equitable character. For example, the common-law courts cannot set aside a deed because it was fraudulently procured; but equity is able to do this, and in many cases it is the only adequate remedy. This is an example of the concurrent jurisdiction of the equity courts.<sup>25</sup>

One of the most important examples of the auxiliary jurisdiction is what is called the “perpetuating of the testimony of witnesses.” If a witness in an action at law is expected to die before the trial of the cause, or for some other reason will be unable to testify at that time, equity will often lend its aid by taking his testimony at once, in order that injustice may not be done by its absence at the trial. This auxiliary jurisdiction is also sometimes called “assistant jurisdiction.”<sup>26</sup>

Virginia, and West Virginia. The distinction between legal and equitable remedies has been abolished in New York, Missouri, Minnesota, California, Connecticut, Indiana, Ohio, Wisconsin, South Carolina, and other western States. But although in the States last mentioned there are no separate equitable actions, the system of equity is none the less operative. Equitable remedies remain in full force, but are applied in accord-

ance with the same procedure as those of common law.

24. See 16 Cyc. 33, 81, 84, 92, 94. The leading subjects over which equity has jurisdiction are trusts and trustees, foreclosure of mortgages, accident, mistake, account, specific performance, partition of joint estates, interpleader, and injunctions.

25. See 16 Cyc. 81 *et seq.*

26. See 13 Cyc. 854, 858.

§ 37. **The Maxims of Equity.** A maxim is a concise statement of a fundamental truth or principle. The maxims of equity are those maxims in accordance with which the remedies of the chancery courts are applied. These maxims are so uniformly observed that the most important of them form a sort of constitution or fundamental law for the equity system.<sup>27</sup>

*"Equity will not suffer a wrong to be without a remedy."* This maxim is of the utmost importance, for it is the key to the whole system. Equity took its rise from the inability of the common-law courts to give full justice, and by asserting this principle it developed its peculiar system. Not only will it not suffer a wrong to be without a remedy, but it will see that the remedy is an adequate one.<sup>28</sup>

*"Equity delights to do justice and not by halves."* This means that it is the aim of equity to have all interested parties in court, and to render a complete decree adjusting all rights and protecting the parties against future litigation.<sup>29</sup>

*"Equity acts in personam."* That is to say, when it renders its decree, it directs the various parties to perform such acts as are necessary to the doing of complete justice in the case; and, if they refuse to obey the directions of the court, they are guilty of contempt of court, and punished personally. A law court, on the other hand, would merely enter judgment, which is available against the person's property, rather than against the person himself.<sup>30</sup>

*"Equity regards substance rather than form."* By force of this principle equity goes behind the form of a transaction in order to give effect to the intention of the parties, either to aid an act abortive at law, because formally defective, or to impose a liability as against an evasion by a formal concealment of its true character.<sup>31</sup>

*"Equity looks upon that as done which ought to be done."* Thus, if a contract is made and broken, and the breach is of such a nature that there is no adequate remedy at law, equity will grant what is known as "specific performance of the contract." Even though the complaining party has not performed all that he had promised, equity will assume that he has done so, for the purposes of the granting of the specific performance, in many cases.<sup>32</sup>

*"Equity imputes an intention to fulfill an obligation."* That is, when a man promises to do a certain thing, equity will assume that he intended to do it, until the contrary is shown; and, if he

27. See 16 Cyc. 133.

28. See 16 Cyc. 133.

29. See 16 Cyc. 134.

30. See 16 Cyc. 134.

31. See 16 Cyc. 134.

32. See 16 Cyc. 135.

does something which may be regarded as a partial fulfilment of such a promise, equity will so regard it.<sup>33</sup>

*"Equality is equity."* For example, if equity should be called upon to apportion either assessments or dividends among several, it would apportion them equally, as far as possible.<sup>34</sup>

*"Equity follows the law."* That is, equity will observe legal rules so far as it can do so without hindering the application of its peculiar remedies.<sup>35</sup>

*"Where the equities are equal, the first in order of time shall prevail."* In other words, where there is no ground for decision in the character of the rights themselves, that right which has existed longest shall be enforced.<sup>36</sup>

*"Where there is equal equity, the law must prevail."* This maxim signifies that where the two parties have equal rights, but one of them has also a right at the common law which the other has not, the former is entitled to have his legal right enforced. He would, therefore, be sent back to the law courts for his remedy.<sup>37</sup>

*"He who comes into equity must do so with clean hands."* For example, if he claims fraud, he must himself be free from fraud, or the court will not listen to him.<sup>38</sup>

*"He who seeks equity must do equity."* Not only must he have clean hands, but he must be willing to do all that is right and fair in the transaction.<sup>39</sup>

*"Equity aids the vigilant, not the indolent."* Consequently it will not encourage a man in "sleeping on his rights." If he wishes to receive aid from the equity courts, he must be prompt in applying to them.<sup>40</sup> This is known as the doctrine of laches.

§ 38. *The Written Law in General.* The written law of England consists of the acts of parliament. The written law of the federal government in the United States consists of the federal constitution, the treaties made by its authority, and the acts of congress. The written law of each individual State consists of its own constitution and the rules enacted by its legislature. All laws laid down by a legislative body, whether by parliament, congress, or a state legislature, are called "statutes." A statute may be defined as a law which a legislature creates by a single formal enactment.

The fact that England has no "written constitution" in the sense in which the term is used in America is elsewhere noticed.<sup>41</sup>

33. See 16 Cyc. 136.

34. See 16 Cyc. 137.

35. See 16 Cyc. 137.

36. See 16 Cyc. 139.

37. See 16 Cyc. 138.

38. See 16 Cyc. 144.

39. See 16 Cyc. 140.

40. See 16 Cyc. 140.

41. See *supra*, § 20; *infra*, § 81.

The English constitution is therefore part of the unwritten law of England. In Germany, on the other hand, the constitution is written, as it is likewise in France and a number of other modern states. It was in America, however, that the idea of reducing constitutions to written form was first adopted and put into extensive practical operation. Written constitutions are usually revolutionary; that is, they usually follow a change of governmental form. It is with constitutions as it is with ordinary laws — so long as the usual customary rules suffice, they are left in their unwritten form; but, when any radical change is desired, the more definite, positive rules of the written law are called into being.

England's only written law is that which is enacted by parliament. But in the United States we have not only our constitutions as part of the written law, but also the treaties which are made by our government with other nations. Treaties are, ordinarily, merely a part of the international law;<sup>42</sup> and they would not be a part of the municipal law of this country were it not for the clause of the federal constitution which provides that "this constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."<sup>43</sup> The effect of this provision is to make treaties a part of the municipal law of the United States; and, as they are created and promulgated in definite written form, they are a part of the written law.

Each State of the United States also has its constitution, which is part of the written law of that State. The constitutions of the States and of the United States, while forming the fundamental law of the land, deal only with those principles which lie at the base of our institutions, and form only a small part of the written law. The constitutions consist largely of general rules; statutes are specific, descending to particulars, and are necessarily much greater in bulk. From the fact of the prominence of the statutes, the whole body of the written law is often referred to, although inaccurately, as "statutory law." "A statute" is one of the units of which the statutory part of the written law is composed. It may consist of a single rule of law, or of a collection of rules

42. All international law is, in one sense, part of the law of the land; for, when a nation becomes bound to observe international law rules, it will ordinarily require its own subjects to refrain from violating them.

Thus, the common law recognized certain crimes against the international law as a violation of its own principles.

43. U. S. Const. art. 6.

which are enacted at the same time, and which usually refer to the same subject-matter.

§ 39. *Relation of the Written to the Unwritten Law.* The written law supersedes the unwritten law so far as they are inconsistent with each other. The written law is invariably the result of some definite, authoritative act of creation on the part of the government of a State. The process of growth which is so characteristic of the unwritten laws is absent, and, in its stead, there is the certainty of an express act. The great mass of the law, is, as we have seen, unwritten. We have also seen that the unwritten law has within itself the power of change. But its changes are necessarily gradual, and often prove inadequate to the demands of the times. By legislation, on the other hand, the law may be changed instantaneously. Important changes must be made in this way, and it is the most convenient and certain way of making any change which is desired. As Mr. Holland remarks: "Legislation tends, with advancing civilization, to become the nearly exclusive source of new law."<sup>44</sup>

When a statute is passed the object of which is to change some part of the unwritten law, however, that part of the unwritten law is seldom expressly repealed. Indeed, it is seldom noticed at all in the statute. The legislature proceeds as if no law governing the subject existed. The courts, therefore, being bound to recognize the superior force of the express will of the legislature, apply the rule that, wherever a rule of the unwritten law is in conflict with a statutory or constitutional provision, the latter will govern, the former becoming invalid.

§ 40. *The Constitution of the United States.* As we have seen,<sup>45</sup> the constitution of the United States was adopted by the States and went into effect March 4, 1789. It is purely a written constitution, and is not limited by any unwritten rules except those relating to its interpretation. It created the federal government — the United States of America — and provided for and defined the several departments, legislative, executive, and judicial, and their respective powers and functions. In adopting it, each State has surrendered to the federal government a portion of its authority, but all powers not thereby delegated to the federal government, nor prohibited by it to the States, are reserved to the States respectively, or to the people.<sup>46</sup>

The original constitution consists of seven articles. Article I vests all legislative powers in congress and provides for the constitution, election, functions, and powers of that body. Among the

<sup>44</sup> Holland Jurisp. 65.

<sup>45</sup> See *supra*, § 20.

<sup>46</sup> U. S. Const. art. 1-7; Amendm. art. 9, 10. And see 8 Cyc. 695, 771, 772.

various functions delegated by the constitution to the federal government, and particularly to congress, as its legislative body, are the following: (1) To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States, all such duties, etc., however, to be uniform throughout the United States; (2) to borrow money on the credit of the United States; (3) to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; (4) to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies; (5) to coin money, regulate the values thereof, and of foreign coin, and to fix the standard of weights and measures; (6) to provide for the punishment of counterfeiting the securities and current coin of the United States; (7) to establish post-offices and post roads; (8) to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries (copyrights and patents); (9) to constitute tribunals inferior to the supreme court (like the federal circuit and district courts); (10) to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; (11) to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; (12) to raise and support armies, but no appropriation of money to that use to be for a longer term than two years; (13) to provide and maintain a navy; (14) to make rules for the government and regulation of the land and naval forces; (15) to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; (16) to provide, subject to certain qualifications, for organizing, arming, disciplining, and governing the militia; (17) to exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may, by cession of particular States and the acceptance of congress, become the seat of the government of the United States (i. e. the District of Columbia), and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and (18) to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.<sup>47</sup>

Article I also contains express *limitations* on the powers of congress and the federal government. Thus it provides *inter alia*,

47. U. S. Const. art. 1, § 8.

(1) that the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it; (2) that no bill of attainder or *ex post facto* law shall be passed; (3) that no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration thereinbefore directed to be taken; (4) that no tax or duty shall be laid on articles exported from any State; (5) that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another; (6) that no money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time; (7) that no title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.<sup>48</sup>

Article I also contains a number of express *limitations* on the power of the States. Thus it provides that no State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold or silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; grant any title of nobility; lay, without the consent of congress, any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, etc.; or lay any duty on tonnage, keep troops or ships of war in time of peace, enter into an agreement or compact with another State or with a foreign power, or engage in war unless actually invaded or in such imminent danger as will not admit of delay.<sup>49</sup>

Article II of the federal constitution relates to the *executive branch* of the government, vests the executive power in the president, provides for the election of president and vice-president, and prescribes their qualifications, tenure, functions, powers, etc. It gives the president power, *inter alia*, by and with the advice and consent of the senate, to make treaties, to appoint various federal officers, etc.

Article III relates to the *judicial power* and vests the same in the supreme court of the United States and in such inferior courts as congress may from time to time ordain and establish; and congress, in pursuance of the power conferred upon it, has created

48. U. S. Const. art. 1, § 9.

49. U. S. Const. art. 1, § 10.

various inferior federal courts — the court of claims, the circuit courts of appeal and the circuit and district courts. It is provided by this article that the judicial power of the United States shall extend (1) to all cases, in law and equity, arising under the constitution, the laws of the United States, and treaties made under their authority; (2) to all cases affecting ambassadors, other public ministers, and consuls; (3) to all cases of admiralty and maritime jurisdiction; (4) to controversies to which the United States shall be a party; (5) to controversies between two or more States; (6) between a State and citizens of another State; (7) between citizens of different States; (8) between citizens of the same State claiming lands under grants of different States; and (9) between a State, or the citizens thereof, and foreign states, citizens, or subjects. And trial of all crimes, except in cases of impeachment, must be by jury, and must be held in the State where the crimes are committed, or, when not committed within any State, at such place as congress may direct by law.<sup>50</sup> By this article, also, treason against the United States is defined as consisting "only in levying war against them, or in adhering to their enemies, giving them aid and comfort," no person to be convicted thereof, however, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Article IV declares, *inter alia*, (1) that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; (2) that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States; and (3), in substance, that fugitives from the justice of one State, who shall be found in another, shall be delivered up by the latter on demand of the former; (4) as to the admission of new States into the Union; (5) that congress shall have power to dispose of and make rules and regulations respecting the territory or other property belonging to the United States; and (6) that the United States shall guarantee to every State in the Union a republican form of government, and protect each of them against invasion, and, on its application, against domestic violence.

Article V provides the mode for proposing and adopting amendments to the constitution. Article VI adopts debts contracted and engagements entered into before adoption of the constitution; declares that the constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the

50. U. S. Const. art. 3, § 2.



land, and that the judges in every State shall be bound thereby, "anything in the constitution or laws of any State to the contrary notwithstanding"; and also requires that United States senators and representatives, members of the State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this constitution, but declares that no religious test shall ever be required as a qualification to any office or public trust under the United States. And article VII, the last article, provided for ratification of the constitution by the States and its establishment thereby.

This constitution was ratified and adopted by the States and went into effect March 4, 1789. Since that date fifteen articles have been added by amendments proposed by congress and adopted by the States as provided by article V. The first ten amendments were proposed in 1789 and finally adopted in 1791; the eleventh was adopted in 1798; the twelfth in 1804; the thirteenth in 1865; the fourteenth in 1868, and the fifteenth in 1870. These amendments are as follows:

Article I declares that congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances.

Article II declares that, a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

Article III declares that no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

Article IV declares that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Article V declares in substance (1) that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war and public danger; (2) that no person shall be subject for the same offense to be twice put in jeopardy of life or limb; or (3) be compelled in any criminal case to be a witness against himself; or (4) be deprived of life, liberty, or property, without due process of law; and (5) that

private property shall not be taken for public use without just compensation.

Article VI declares that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article VII declares that in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law.

Article VIII declares that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Article IX declares that the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Article X declares that the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In this connection the attention of the student is called to the fact that it has been settled by the decisions of the supreme court of the United States that the first ten amendments of the constitution, to which we have just referred, were not intended to and do not limit the powers of the States, in respect to their own people, but operate on the national government only. Some of these provisions, however, or similar ones are found in most of the State constitutions.

Article XI declares that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

Article XII provides for the meeting of the electors and the proceedings in the election of president and vice-president of the United States.

Article XIII declares that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or in any place subject to their jurisdiction; and congress is given the power to enforce the article by appropriate legislation.

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Article XIV provides, in section 1, that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside; and that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. Section 2 provides for the apportionment of representatives in congress among the several States according to population, and for reduction of the basis of representation if the right of citizens in any State to vote is denied or abridged. Section 3 relates to disqualification to hold federal office of persons who, as federal or State officers, having taken an oath to support the constitution of the United States, engage in insurrection or rebellion against the same, etc. Section 4 prohibits the questioning of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, and declares that neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, etc. Section 5 gives congress power to enforce the article by appropriate legislation.

Article XV, the last amendment, declares that the right of the citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude; and congress is given power to enforce the article by appropriate legislation.

The construction and effect of this constitution will be taken up later and fully considered in the course on "Constitutional Law." It is sufficient for present purposes to call attention to the fact that it is the source of all the powers of the federal government and its several departments, including congress; and it also contains, as we have seen, certain limitations on the powers of the State legislatures. It is "the supreme law of the land." In its construction the decisions of the supreme court of the United States are binding on the State courts, anything in the constitution or laws of any State to the contrary notwithstanding. The United States congress can pass, not such laws as are not prohibited, but such laws only as are authorized, by the constitution. The State legislatures can pass no law which is expressly or impliedly prohibited by the federal constitution. To illustrate: Congress cannot enact a law governing the subject of divorce or insurance in the States, because no such power is conferred

upon it by the constitution, to which it owes its existence; and on the other hand, a State legislature cannot enact a law interfering with interstate or foreign commerce, or imposing duties on imports or exports, etc., because the constitution gives congress the exclusive jurisdiction in these matters. If congress passes any law which is not within the authority conferred upon it by the federal constitution, or if a State passes any law which is in conflict therewith, the law is absolutely void, and the courts will so hold in any case which comes before them.

§ 41. **Acts of Congress.** Congress, composed of the senate and house of representatives, is, as we have just seen, the legislative body of the United States, with authority also to legislate locally for the District of Columbia and for the territories of the United States. Its authority is derived from and dependent upon the constitution of the United States. It can pass any law which is expressly or impliedly authorized by that instrument. For example, it has the power to pass laws regulating interstate and foreign commerce. On the other hand, it can pass no valid law which is not within the powers conferred by the constitution. Thus it cannot pass a law regulating generally divorces, insurance, contracts, or torts in the several States. Any act of congress within the powers conferred by the constitution is binding in and on the States; but any act beyond those powers is void.

§ 42. **Treaties.** Treaties entered into between the United States and foreign nations by the president by and with the advice and consent of the senate, as authorized by the constitution of the United States, have the force of law. As we have seen, it is expressly declared by the constitution that they "shall be the supreme law of the land," and that "the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."<sup>51</sup>

§ 43. **State Constitutions.** Each State of the Union has a constitution or bill of rights. This instrument consists of a number of fundamental laws adopted by the people for the government of the State, and which cannot be altered or repealed except by the people themselves.<sup>52</sup> It is superior to the will of the legislature, and any act passed by that body in violation thereof or in conflict therewith is void. A State constitution must yield, however, in so far as it is in conflict with the constitution of the United States, or with acts of congress or treaties enacted or made in pursuance thereof. Every student of the law should read carefully the constitution of his State.

§ 44. **Acts of State and Territorial Legislatures.** The States of the Union are not mere instruments of government established by

51. See *supra*, § 38.

52. See 8 Cyc. 695.

and under the control of the federal government, but are independent political organizations, equally as permanent and equally as supreme in matters within their jurisdiction as the federal government. All powers which are not expressly or impliedly conferred upon the federal government by the constitution of the United States are, as we have seen, reserved to the State governments. The legislative power of a State is vested by its constitution in its legislature or general assembly, composed of a senate and house of representatives. The power of a State legislature to enact laws, therefore, is inherent and unlimited, except only that it cannot pass a valid law which violates or conflicts with any provision of the federal or State constitution. The powers of the federal and State legislatures differ in this respect: The former cannot pass a law which is not either expressly or impliedly authorized by the federal constitution; the latter can pass any law that is not expressly or impliedly prohibited by the federal or State constitution. In other words, while the federal constitution is a *grant* to the federal government of powers which it would not otherwise possess, a State constitution is a *limitation* of the powers which the State would otherwise have.

The territories of the United States are not in the same position of sovereignty as the States, and they have no inherent power of legislation. All their powers are derived from congress. By act of congress the powers of the territorial legislatures extend "to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."<sup>53</sup>

§ 45. **Municipal Ordinances or By-Laws.** Municipal corporations, which include cities, villages, etc., are political subdivisions of a State created into bodies corporate by charter from the legislature, and have such powers of legislation only as are conferred upon them by the legislature. They are, however, generally given the power, more or less limited, to enact ordinances or by-laws for the regulation of local affairs. These have the effect of local laws to preserve the peace, order, health, and comfort of the people, and to give the municipality remedy for their violation.<sup>54</sup>

§ 46. **Enactment of Statutes.** A statute, to be valid, must be enacted in conformity with the provisions of the constitution, and, unless so enacted, it is void; but it is not necessary to its validity that the rules of parliamentary law, nor even the special rules of the body which enacts it, be strictly followed. Before its passage by the legislature, the proposed statute is called a "bill"; after its passage, it is often referred to as an "act." The successive steps in the enactment of a statute are usually as follows:

53. U. S. Rev. St. (1878) § 1851.

54. See 28 Cyc. 347.

(1) Introduction of the bill in either house; (2) reference to a committee; (3) three readings on different days; (4) the vote; (5) signature by presiding officer; (6) presentation to the other house, where the same procedure is repeated; (7) signature of the executive in those States where it is necessary and (8) reconsideration, in case the executive veto it.

In order that its proceedings be valid, it is, of course, indispensable that the legislature itself be constituted in conformity with all constitutional provisions. If it is not so constituted, it is not a legislature. Furthermore, if there are any rules in the constitution regulating the method of creating laws, such rules must also be followed. Constitutions usually contain such general regulations, concerning the enactment of laws, as shall insure a sufficient deliberation upon the bill before its passage, and make certain that it represents the genuine intention of the legislative body before it becomes a law. In respect to all other matters which are not the subject of constitutional provision, legislatures are subject to only such rules as they may prescribe for themselves or choose to recognize. The rules of the system known as "parliamentary law" are usually followed, except as to those matters in regard to which particular legislatures adopt special rules designed to meet their own peculiar wants. Inasmuch as the legislature has full power to change these rules whenever it may see fit, if a particular statute is enacted by it in conformity with all constitutional provisions, such a law will be upheld, even though the special rules of the legislative body or the general parliamentary law were not observed in its passage.<sup>55</sup>

As a rule, bills may be introduced in either house of the legislature, but it is customary for constitutions to provide that bills for raising revenue must originate in the lower house.<sup>56</sup> The reason of this is that the lower house, being invariably the most numerous branch of the legislature, is regarded as better fitted to guard wisely the rights of the people in all matters which may result in taxation. When the bill is introduced, it is usually referred to the committee whose business it is to carefully consider bills of that particular class. By this reference to a committee, it is supposed that the bill will receive more thorough consideration than it is possible for the entire legislature to give it. After its consideration by the committee, the bill is referred back to the house, with the results of the committee's investigations. If the committee recommend that the bill be not considered by the house, it is usually dropped. If, however, the committee report favorably upon it, the bill is put to its three separate readings, and,

55. See Statutes, — Cyc. —.

56. U. S. Const. art. 1, § 7.

after such debate as may be necessary, is voted upon. If passed, it is signed by the presiding officer, and presented to the other house of the legislature. Here it passes through substantially the same procedure, and, if it receives the approval of this house, it becomes a law, provided the executive gives it his approval. If, however, it is vetoed by the executive, in order to become a law in spite of such veto it is necessary that it be again passed by a two-thirds vote of both houses.

§ 47. **Constitutionality of Statutes.** As has already been stated, no State statute is of any validity which lays down rules inconsistent with any provision of the constitution of the United States, or of the State by whose legislature it is enacted. All laws passed by the congress of the United States must conform to the federal constitution. Statutes which do not conform to this rule are unconstitutional and void. The power of determining whether a statute is constitutional or not is usually vested in the highest courts of last resort.<sup>57</sup>

§ 48. **Affirmative and Negative Statutes.** As to their form, statutes are either affirmative or negative. An affirmative statute is one which is enacted in affirmative terms. A negative statute is one which is expressed in negative terms. The effect of an affirmative statute is not necessarily to supersede the common law upon the same subject-matter, for it is so worded that it is not necessarily inconsistent with the common-law principles. Against negative statutes, however, the rules of the unwritten law are of no effect. The difference in operation between the two classes of statutes is illustrated by a learned writer as follows: "If a statute were to provide that it should be lawful for a tenant in fee simple to make a lease for twenty-one years, and that such lease should be good, an affirmative statute could not restrain him from making a lease for sixty years; but a lease for more than twenty-one years would be good, because it was good by the common law; and, to restrain him, it ought to have words negative, as that it shall not be lawful for him to make a lease for above twenty-one years, or that a lease for more shall not be good."<sup>58</sup>

§ 49. **Declaratory and Remedial Statutes.** As to their relation to the common law, statutes are either declaratory or remedial. A declaratory statute is one which merely affirms principles which already existed under the common law. A remedial statute is one which modifies the principles already existing under the common law. In legal theory, there is a rule to govern every state of facts; and, if this rule is not to be found in the written law, it will be found in the unwritten. Theoretically, therefore, the

<sup>57</sup> See *supra*, §§ 41, 44; *infra*, § 82.

<sup>58</sup> Potter Dwar. St. 70. See "Statutes," — Cyc. —.

legislature never creates a rule absolutely new. It either affirms or modifies a rule already existing. It is not to be understood that this rule is always to be found in the reports of adjudicated cases. It may never previously have been applied to a state of facts. But it is plain that, even had no statute been passed upon the subject, if a case had arisen which required its application the courts would have found it and applied it. The class of remedial statutes includes, therefore, all statutes which do not merely affirm unwritten-law principles.<sup>59</sup>

**§ 50. Public and Private Statutes.** As to the persons to whom they apply, statutes are either public or private. A public statute is one which is applicable to the public generally. A private statute is one which relates to a single person, or a particular class of persons, and does not apply to the whole community.<sup>60</sup> This distinction between public and private statutes is ordinarily clear. For example, a law of congress granting a pension to a particular person would be a private statute; while a law providing for the bestowal of pensions upon all who conform to certain conditions is public. But it sometimes occurs that a statute partakes of both a public and private character. The essential character of such a statute is then a matter of determination by a court. Its determination sometimes becomes of importance, for courts will take "judicial notice" of a public statute; that is, they will not require it to be proven by the party who alleges its existence. A private statute, on the other hand, must be proven, as well as any other fact essential to the case in which it arises.<sup>61</sup>

**§ 51. General and Local Statutes.** As to the territory to which they apply, statutes are either general or local. A general statute is one which applies to the entire territory over which the legislature has authority. A local statute is one which applies only to a limited portion of the territory over which the legislature has jurisdiction.<sup>62</sup> The classification into general and special statutes is sometimes confused with that into public and private. The first involves a distinction of persons; the latter, a distinction of place. A local statute may be public, and it is not impossible to conceive a private statute which is at the same time general. The two classifications are distinct, for the basis of classification is different.

**§ 52. Mandatory and Directory Statutes.** As to the results of non-compliance with its provisions, a statute may be either mandatory or directory. A mandatory statute is one which renders the acts to which it refers void unless its provisions are complied

59. See "Statutes," — Cyc. —.

60. See "Statutes," — Cyc. —.

61. See 16 Cyc. 889, 896.

62. See "Statutes," — Cyc. —.



with. A directory statute is one which lays down certain rules relating to particular acts, which acts may be valid although such rules are not complied with.<sup>63</sup>

It is often difficult for the courts to decide whether a particular statute was intended to be mandatory or merely directory. It is a matter of construction, and all the circumstances which attended the passage of the law are taken into consideration, unless its character can be determined by a study of the words employed. As an illustration, the laws requiring marriage licenses which have been passed in many of the States might be cited. Were these laws mandatory, they would tend toward restricting marriage. But the law favors marriage, and from this the courts argue that these license laws are merely directory, and that a marriage entered into without a license will be valid; the only real force which they have growing out of the provision under which ministers and others who solemnize a marriage between persons who have no license are punished. The marriage itself is valid, although the law be entirely ignored.<sup>64</sup>

§ 53. **Prospective and Retrospective Statutes.** As to their operation, statutes are prospective or retrospective. A prospective statute is one which applies only to acts which arise after its enactment. A retrospective statute is one which applies to acts which took place or rights which existed before its enactment.<sup>65</sup> Retrospective laws are seldom passed, and in some jurisdictions are prohibited by constitutional provisions.<sup>66</sup> *Ex post facto* laws — that is such retrospective laws as make acts, innocent when done, crimes, or increase the penalty attached to crimes already committed — are prohibited by the constitution of the United States.<sup>67</sup>

63. See "Statutes," — Cyc. —.

64. See 26 Cyc. 850.

65. See "Statutes," — Cyc. —.

66. See 8 Cyc. 1017.

67. U. S. Const. art. 1, §§ 9, 10.  
See 8 Cyc. 1027.

## CHAPTER IV.

### THE AUTHORITIES AND THEIR INTERPRETATION.

- § 54. The Rank of the Various Authorities.
- 55. General Rules for the Interpretation of Laws.
- 56. Rules for the Construction of Statutes.
- 57. The Interpretation of Cases.

§ 54. **The Rank of the Various Authorities.** The various sources of law in the United States rank in authority as follows: (1) The constitution of the United States. (2) The treaties and statutes of the United States. (3) The constitution of the State. (4) The statutes of the State. (5) Local ordinances. (6) The common law as evidenced by the reports of cases. (7) The common law as evidenced by usage.

In determining the law applicable to a particular case in controversy before the courts, the judge appeals to the various sources of authority which are mentioned above. If the necessary principle is found in the constitution of the United States, he need look no further, for that document is of supreme authority.<sup>1</sup> But, as we have already seen, the principles of law which are stated in the constitution are few, and of the most general character. Next in rank to the constitution as a source of authority are the treaties and statutes of the federal government.<sup>2</sup> These are of coördinate rank. A later treaty will supersede a prior statute if contradictory thereto, and a later statute will supersede a prior treaty.<sup>3</sup> No law of the particular States has any force if inconsistent with the laws, treaties, or constitution of the federal government. It is of course to be understood that the federal government can enact only such laws as are within its jurisdiction as established by the federal constitution.<sup>4</sup>

A large majority of the cases which come before the State courts involve only the laws of the particular State. At the basis of these laws is the State constitution, which is fundamental in its character. No statute of the State is of any validity if it is inconsistent with the principles of the constitution.<sup>5</sup> Furthermore, no enactment of a subordinate legislative body, as that of a municipal corporation, is of any validity when it contradicts either a statute or the constitution of the State in which it is situated.<sup>6</sup> The authorities which have thus far been mentioned together make up the written law which is in force in the United States. As we

1. See *supra*, § 40.

2. See *supra*, §§ 41, 42.

3. See "Treaties," — Cyc. —.

4. See *supra*, § 41.

5. See *supra*, §§ 43, 44.

6. See 28 Cyc. 363, 365.

have already seen, the unwritten or common law is of no force as against any statutory or constitutional principle.<sup>7</sup>

§ 55. **General Rules for the Interpretation of Laws.** The interpretation or construction of the laws, and particularly of statutes and constitutions, is a large subject and an important one, for often their meaning is not clear. The business of courts is to apply the law to particular states of fact which come before them; but their object is not accomplished, or is only partly accomplished, when they have found a rule which seems to apply to the case in hand. They have still to determine the exact meaning of the law, and hence there arises a necessity for rules of interpretation. These rules have grown up as part of the unwritten law, and are based upon the wisdom and experience of the courts. The following general rules apply to the interpretation of all laws, whether written or unwritten:<sup>8</sup>

1. Words are generally to be understood in their ordinary popular signification;<sup>9</sup> but technical terms are to be interpreted according to their meaning in the art or science in which they are employed.

2. Words and phrases should be interpreted in the light of the context. For example, if the same word appears twice in the same law, its meaning in one instance may assist in its proper interpretation in the other.

3. Where a particular rule is in itself of doubtful significance, the subject-matter of the law will usually be found of assistance in determining its meaning.

4. If a rule is capable of two interpretations, one of which is absurd and the other reasonable, it is to be presumed that the latter interpretation is intended.<sup>10</sup>

5. The reason and spirit of a law are always to be considered in its interpretation.<sup>11</sup>

7. See *supra*, § 39.

8. 1 Blackstone Comm. 59.

9. "Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf which forbade a layman to *lay hands* on a priest, was adjudged to extend to him who had hurt a priest with a weapon." 1 Blackstone Comm. 59.

10. "As to the *effects* and *consequence*, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the

Bolognian law, mentioned by Puffendorf, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' was held after long debate not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit." 1 Blackstone Comm. 60.

11. "But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given

In addition to the rules which have just been stated as applicable to all laws, various technical rules for the interpretation of statutes are also in vogue, as well as other equally technical rules which govern the interpretation of judicial decisions, as will be seen in the following sections.

§ 56. **Rules for the Construction of Statutes.** In addition to the general rules stated in the preceding section, the following special rules apply to the construction of statutes:<sup>12</sup>

1. Statutes are to be interpreted in the light of the unwritten law.<sup>13</sup> If a statute is merely declaratory of the unwritten law, its meaning may be determined by the true meaning of the principles of the unwritten law which it declares, or, if a statute contains a word whose meaning has already been determined in the unwritten law, it is presumed to have the same meaning in the statute.<sup>14</sup>

2. Statutes which apply to persons or things of an inferior rank cannot, by any general words, be extended to those of a superior.<sup>15</sup>

3. Penal statutes are to be strictly construed. That is, they are to be construed in the interest of the accused person, who is to be given the benefit of any doubts as to their construction.<sup>16</sup>

in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius. There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who stayed in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither stayed in the ship upon that account, nor contributed any thing to its preservation." 1 Blackstone Comm. 61.

12. See 1 Blackstone Comm. 87; and "Statutes," — Cyc. —.

13. "There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the

making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy." 1 Blackstone Comm. 87.

14. See 8 Cyc. 383, 384.

15. "So a statute, treating of 'deans, prebendaries, parsons, vicars, and others having spiritual promotion,' is held not to extend to bishops, though they have spiritual promotion, deans being the highest persons named, and bishops being of a still higher order." 1 Blackstone Comm. 88.

16. "Penal statutes must be construed strictly. Thus the statute 1 Edw. VI, c. 12, having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this should not extend to him that should steal but one *horse*, and therefore procured a new act for that purpose in the following year." 1 Blackstone Comm. 88.

As to the meaning of "benefit of clergy" see 12 Cyc. 778.

4. Statutes relating to fraud are to be construed liberally and beneficially.<sup>17</sup>

5. A saving or condition totally repugnant to the body of the statute is of no effect.<sup>18</sup>

6. A statute has no power to impose limitations upon the authority of future legislatures.<sup>19</sup>

7. A later statute impliedly repeals all prior statutes with which it is inconsistent.<sup>20</sup>

8. Under the common law, the repeal of a repealing statute operated to revive the original statute; but in England at this time, and in many of the States, this rule has been abolished.

17. "Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5, which avoids all gifts of goods, etc., made to defraud creditors *and others*, was held to extend by the general words to a gift made to defraud the queen of a forfeiture." 1 Blackstone Comm. 88.

18. "A saving, totally repugnant to the body of the act, is void. If, therefore, an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A. in the king, saving the right of A.; in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king." 1 Blackstone Comm. 89.

19. "Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII. c. 1, which directs that no person for assisting a king *de facto* shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder. Because the legislature, being in truth the sovereign

power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavour to tie up the hands of succeeding legislatures. 'When you repeal the law itself, (says he,) you at the same time repeal the prohibitory clause, which guards against such repeal.'" 1 Blackstone Comm. 90.

20. "But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks: here the latter statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end. But if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter-sessions, and a latter law makes the same offence indictable at the assizes, here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express

9. One part of a statute is to be so construed in the light of another that the whole, if possible, may stand.

10. If, when all the rules of interpretation have been applied, no reasonable meaning can be derived from a particular statute, as if it is impossible to be performed, or if in other respects contrary to reason, the statute will be void.<sup>21</sup>

It must always be borne in mind, however, that the primary rule as to the construction of statutes is to ascertain and give effect to the intention of the legislature. "The object of all interpretation and construction of statutes is to ascertain the meaning and intention of the legislature, to the end that the same may be enforced. This meaning and intention must be sought first of all in the language of the statute itself. For it must be presumed that the means employed by the legislature to express its will are adequate to the purpose and do express that will correctly. If the language of the statute is plain and free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the legislature intended to convey. In other words, the statute must be interpreted literally. Even though the court should be convinced that some other meaning was really intended by the law-making power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the

negative words, as, that the offence shall be indictable at the assizes, *and not elsewhere.*" 1 Blackstone Comm. 89.

21. On this point Blackstone says: "Lastly, acts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would

be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no." 1 Blackstone Comm. 91.

legislature is the law, and the courts must not depart from it. If the language of the statute is ambiguous, or lacks precision, or is fairly susceptible of two or more interpretations, the intended meaning of it must be sought by the aid of all pertinent and admissible considerations. But here, as before, the object of the search is the meaning and intention of the legislature, and the court is not at liberty, merely because it has a choice between two constructions, to substitute for the will of legislature its own ideas as to the justice, expediency, or policy of the law."<sup>22</sup>

The rules above stated, as well as those given in the preceding section, apply also in the construction of constitutions. Certain other rules relating specially to constitutions will be considered in a subsequent chapter.<sup>23</sup>

§ 57. **The Interpretation of Cases.** Only those judicial decisions are regarded as authoritative which are handed down by courts of last resort. When a controversy arises, and is brought into a court for determination, the first object of the court is to determine what the facts in the case really are; and this duty is usually performed by what is known as a "trial court." The trial court has power to determine provisionally the law applicable to the case, and in many cases this provisional determination of the law is found satisfactory by the parties to the case, and is not appealed from. If, however, there is dissatisfaction with the decision of the trial judge on a point of law, the parties to the case are usually permitted to appeal to a higher court, whose principal business it is to determine such points by a final authoritative decision. When a court has power to determine finally the legal principles which are to be applied to particular cases, such a court is called a "court of last resort." The decisions on points of law in all other courts, being merely provisional, and liable to reversal or modification if an appeal is taken, are not regarded as of binding authority as precedents, although they may have weight and are often cited and followed.

The decisions of the courts of last resort are reported and published in bound form for the use of courts and the legal profession. The report of a case usually contains a brief statement of facts involved, and a statement by one or more of the judges of their decision on the legal point, as well as the reasons upon which such decision is based. At the head of the report there is usually placed a condensed statement of the leading principles for which the case is authority, which statement is called a "syllabus." In a number of States this syllabus is written by the court itself, but in others it is prepared by the reporter.

22. Black Interpretation of Laws      23. See *infra*, § 82.

35.

*Judicial Decision.*—"A judicial decision is an adjudication by a competent tribunal upon a legal question arising out of a controversy submitted to its judgment and necessary to the determination of the controversy. The judgment of an incompetent tribunal is not a judicial decision. The judgment of a competent tribunal upon a question which is not involved in controversy before it is not a judicial decision. The judgment of any tribunal upon a question involved in the controversy before it, but which it is not necessary to decide in order to decide the controversy, is not a judicial decision. But those propositions of law, whether one or many, whether principal or subordinate, which the court was compelled to pass upon in order to reach the conclusion by which the rights of the contending parties were eventually adjusted and established, taken collectively, constitute the decision."<sup>24</sup>

*Obiter Dicta.*—As is stated above, a particular decision is authority for only those principles of law which are necessary to determine the case before the court. If any other principles are laid down than those necessary to the decision of the case, they are of no weight as authority, and are called "*obiter dicta*."<sup>25</sup> This rule is a fundamental one. The court, in laying down the law for a particular case, has no authority to go outside of its duty, and determine principles which, however appropriate they may be in other cases, have no bearing upon the one in controversy. And, when the court does so exceed its authority, it is plain that such principles are *obiter dicta*, and cannot be regarded as of any more force than a mere opinion of the judge in his individual, rather than his official, capacity.<sup>26</sup> Yet it is sometimes very difficult to distinguish *obiter dicta* from the true doctrines of the case. This can best be done by carefully examining the facts, and extracting from them, as nearly as possible, the exact point in issue. If the rule stated by the judge tends directly to decide this issue, it forms part of the doctrine of the case; if not, it is ordinarily *obiter dictum*.

*Conflict of Authority.*—Whenever a court lays down a principle of law inconsistent with that which is laid down by another court of equal authority, there is said to be a conflict of authority. If, however, the same court at a later time lays down a doctrine

24. Robinson Elem. Am. Jur. § 285.

25. "*Obiter dicta*" means literally "things incidentally said." Its force in this connection will be apparent.

26. "Nevertheless, some weight is very properly given to a *dictum*, a weight similar to that assigned to the sayings of learned text-writers;

and in this sense a *dictum* is authority, its weight varying with the learning of the court and with the amount of thought bestowed by the court upon the point covered by the *dictum*." Wambaugh Study of Cases, § 13.



which is inconsistent with its decision in a previous case, the former decision is said to have been overruled. Whenever a point arises on which there is a conflict of authority, the court is determined in its decision by its own views as to the correct principle or will decide in favor of that view which is supported by the preponderance of authority. There are in the United States a large number of courts of last resort. Each State has one of these courts, and the United States government has not only its supreme court, but its circuit courts of appeals, which exercise functions of this character. When we consider, too, that the decisions of the English courts are often taken as authority in this country, it will be readily realized that there is a great opportunity for conflict among those courts which administer common law. These conflicts are sometimes the result of failure on the part of the judges, and of those attorneys who argue the cases, to call attention to all the precedents which might be cited, and sometimes are due to a desire on the part of a certain court to introduce reforms into the legal system.

## CHAPTER V

### PERSONS AND PERSONAL RIGHTS

- § 58. Legal Rights, Wrongs, and Remedies.
- 59. Rights in Rem and Rights in Personam.
- 60. Persons, Natural and Artificial — Status.
- 61. Domicile.
- 62. The Fundamental Rights in Rem.
  - a. In General.
  - b. The Right of Personal Security.
  - c. The Right of Personal Liberty.
  - d. The Right of Private Property.
- 63. Constitutional Guaranties of the Fundamental Rights.
  - a. In England.
  - b. In the United States.

§ 58. Legal Rights, Wrongs, and Remedies. The definitions of legal rights, wrongs, and remedies are as follows:

- (1) A legal right is a power, interest, or privilege recognized and protected by the municipal law.
- (2) A legal wrong is the violation of a legal right.
- (3) A legal remedy is the method employed by the law to enforce a legal right, or to redress a legal wrong.

All laws of human action recognize the existence of rights. While in the moral law they are often a mere background for principles which govern the conduct of life, yet in reality every violation of that or any other human law is an infringement of some right, however shadowy that right may be. The moral law deals with moral rights; the divine law has to do with those rights which are supposed to have received divine approval; the international law deals with the rights of nations in their sovereign capacity; the municipal law is concerned with those rights which government recognizes and protects. And so inseparably is the idea of rights interwoven with the conception of law itself that the latter cannot be fully understood without some reference to the former.

A distinction should be drawn between the noun "a right" and the adjective "right." Entirely different ideas are conveyed when we speak of "that which is right," and the "right of a person" to control his property. The former involves an abstract conception of conformity to some fixed standard, while the latter indicates a recognized power to do something, or to control something. Either of these terms may be applied to the law. It may be said that a legal rule is right or wrong, in that it does or does not conform to the ideal of justice, or the rule may be regarded from another point of view, as conferring upon certain persons certain powers. In the present chapter attention

will be devoted to the substantive meaning of the term "a right," inasmuch as a discussion of the other form of the conception would bring us into the field of ethical, as distinguished from practical, jurisprudence.

It will readily be seen that the term "a right" is frequently used in the vernacular as meaning a power which one is morally entitled to exercise. But in the municipal law it is used in a technical sense. In that system, we have seen that no legal force is given to moral rules, as such. The moral law is essentially distinct from the municipal law. While there is a large class of rights which are sanctioned by both systems, yet there are many recognized by each which the other does not enforce. What is morally right may be legally wrong, while it is true that the law allows many things to go unpunished which are morally reprehensible. The municipal law applies its sanctions to no rights, however strong may be the popular approval of them, which are not embodied in the laws of the State, either written or unwritten. Those rights which form the subject-matter of the municipal law are called "legal rights," and it is because it enforces these rights that the whole machinery of that law finds its existence justified.

A legal right is therefore a power, interest, or privilege which the law will protect, and the recognition of which it will enforce by means of its sanctions. Whenever a legal right is violated, the law is violated and a legal wrong committed, and it becomes the duty of the State to redress that violation, which it does by the application of what is called a legal remedy. The application of a legal remedy is in many respects analogous to the administration of a medical restorative. When a human being is in a diseased condition, the physician prescribes such a drug as shall tend to bring about the man's restoration to a normal condition. And so it is in theory of the law. When a person's rights are violated, his condition is regarded as abnormal; and the court, in granting him relief, merely endeavors to restore him to a state of legal health. The laws governing the administration of these legal remedies form what is known as the remedial or adjective law, which will be explained in detail later.<sup>1</sup>

§ 59. **Rights in Rem and Rights in Personam.** Legal rights are divided into two classes, namely:

- (1) Rights *in rem*; that is, those rights which the possessor holds as against the whole community, and which involve a corresponding duty on the part of the whole community to refrain from disturbing them. They are often called "rights of ownership."

1. See *infra*, § 73 *et seq.*

(2) Rights *in personam*; that is, those rights which the possessor may enforce against particular individuals only, and which correspond to obligations on the part of such individuals to act or forbear in regard to the subject-matter of the right. They are sometimes called "rights of obligation."

Every right involves certain acts or forbearances on the part of some person or persons other than the possessor of the right. Thus, if I have a right to the ownership and use of my horse, there is a corresponding duty on the part of all others to abstain from interfering with such ownership and use of it. If a man deprives me of my possession of it, he violates this right which I possess; and the law will use its machinery to enforce the right by punishing the offender, and restoring the horse to me. This particular sort of a right, being enforceable against the community at large, is a right *in rem*. So the right which one has over his own person, being likewise correlative to a general duty on the part of others to forbear, is also a right *in rem*.

Let us suppose, on the other hand, that two persons have entered into a contract with each other consisting of mutual promises. Here a different kind of a right exists. Each has a right to require of the other the performance of what that other has promised. Such a right is not enforceable against all the world, but only against the other contracting party. Being available only against a specific person or specific persons, it is a right *in personam*. A contract, however, instead of consisting of mutual promises may consist in a promise by one of the parties only, and the transfer of something to him by the other, as in the case of a promise to pay for goods which are delivered. In such a case the person receiving the goods acquires a right *in rem*, while the person receiving the promise acquires a right *in personam*.

A right *in rem*, as stated above, is often called a right of ownership. It is correlative to a general duty on the part of all. A right *in personam* is referred to as a right of obligation, because, instead of this general duty, there is a specific obligation resting on a limited number of definite persons. Such a right involves a power to require certain persons to act or forbear in a manner different from the rest of the community. It will be plain that a right *in personam* may grow out of the violation of a right *in rem*. The moment a right *in rem* is violated by a specific person, as by an assault or trespass, there arises a right *in personam* against that person; not a right to exact forbearance on the latter's part, but to compel him to compensate the injured person for the violation. The injurer remains, of

course, under the duty to observe the general right *in rem*, as well as the community at large; but he is also under a more definite obligation *in personam* to pay damages.

§ 60. **Persons, Natural and Artificial — Status.** A person, in the law, is any human being or legal creation capable of possessing legal rights. Persons are classified into (1) natural persons and (2) artificial persons. A natural person is a living human being, of whatever age or sex. An artificial person is a legal entity, existing only as the possessor of legal rights and obligations. The most prominent artificial persons are states and corporations.

By the "status of an individual" is meant the legal position of that individual with reference to the rest of the community. It involves rights and duties which are imposed by the law, and which cannot be avoided by the individual's own act or an agreement.

The meaning of the term "person," in the law, differs somewhat from its general popular use. As a subject of the law, a person is nothing more or less than individuality around which legal rights and duties gather. This individuality may be embodied in human form, or it may be merely a legal conception. The law has not always recognized all human beings as persons. Slaves were usually regarded as mere chattels, without any of the ordinary legal rights, and they therefore would not come within the meaning of the term. Since the abolition of slavery, however, it may be said that, in general, all human beings are persons, and they are distinguished from all other persons by the designation "natural persons."

In order that a human being may be a person, however, his actual existence must have begun; that is, he must have life. Life is ordinarily regarded as begun the moment the child is able to stir in his mother's womb. Previous to that, the law does not regard the unborn child as a person.<sup>2</sup> A human being, moreover, ceases to be a person at the moment of physical death.<sup>3</sup>

In the early history of the law, rights were frequently attached to groups of persons, these groups thereby themselves assuming

2. "From the moment of conception, however, if eventually born alive, the child is treated as having been alive for many beneficial purposes, and while still in the womb of its mother it has civil rights which are entitled to protection; a guardian may be appointed for it; or it may inherit land or take it under a will. If, however, it perish before birth, this antenatal recognition by the law is withdrawn and the existence of the child, even during that temporary

period, is legally ignored. Moreover, until full born, a child is not the subject of a felonious homicide, nor the person causing its death guilty of murder." Robinson Elem. Am. Jur., § 17.

3. As a general rule, when a person is shown or appears to have been living at one time, the presumption, in the absence of evidence to the contrary, is that he is still alive; but a rebuttable presumption of death arises in the case of a person who

some of the attributes of personality. Many rights were in early times attached to the family as such. But at the present time family rights, as such, are seldom or never recognized, having given place to the individual rights of the members who compose the family.

In modern times, the class of artificial persons has attained great importance. The most prominent example of this class is the state itself. The state is a person because it has rights—rights which are usually regarded as paramount. There can, of course, be but one state in a particular community; and, as a consequence, the number of such persons is small. The most numerous artificial persons are corporations which are the creatures of the state.

A person being in the law one who is capable of possessing legal rights and duties, his "status" is sometimes described as the sum of those rights and duties of which he is possessed. In the common language of the books, however, it signifies rather a condition in which a person is placed, by virtue of which certain rights and obligations are imposed by the law on him, as a member of a class. For example, one element of the status of a natural person is his citizenship. On account of his citizenship, he has certain rights and duties in common with all other members of the class of citizens. He has those rights so long as he remains a citizen. He cannot give them up without ceasing to be a citizen. Again, when a human being is an infant, that is, under the age of twenty-one, many of his rights are different from those which attach to him when he becomes of age. When he arrives at his majority, he is said to change his status, so far as those particular rights are involved. This change cannot be influenced by the will of the person himself, but takes place by operation of law.

There are also certain relations between individuals which are commonly referred to as relations of status. Marriage, for example, creates a relation of status between husband and wife. The husband comes under certain liabilities, as that to support his wife, which he cannot avoid, even though the wife agree to release him from them. Relations of status are contrasted with contract relations, the liabilities incident to which may be altered, or even abolished, by an agreement of the parties.

has been absent from his last or usual place of residence and has not been heard from, for a considerable length of time, usually fixed at seven years. See 13 Cyc. 295, 297. "Nothing but his actual death, however, can divest him of his own rights,

and whatever may have taken place in reference to these, on the false assumption of his death, will be invalid, and he can assert and enjoy them as if his continued existence never had been doubted." Robinson Elem. Am. Jur. § 18.

It will readily be seen that the status of a particular person consists of numerous elements. If he is a citizen he comes under the laws, and acquires the rights and liabilities, which attach to the citizen class. As an adult he has the rights of all those who have attained their majority. A person's status also depends on sex, and sometimes on race; and, in general, whenever one becomes a member of a class upon which are imposed by the law certain peculiar rights and liabilities, he varies his status, so far as those rights and liabilities are concerned.

*Normal and Abnormal Status.*—"Status," says Professor Robinson, "is either normal or abnormal. Normal status is the legal character of the great body of citizens for whom the general laws are made and to whom in their full scope and meaning they are applied. Abnormal status is the legal character of those peculiar classes who for one reason or another are regarded as improper subjects for the application of the general laws, and are, therefore, exempted to a greater or less extent from their operation." And he classifies persons of abnormal status as: (1) Infants; (2) insane persons; (3) married women; (4) persons under duress; (5) public officers; and (6) aliens and other persons who are not citizens.<sup>4</sup> As we shall hereafter see, these classes of persons are subject to various special rules of law which do not apply to persons of normal status.

§ 61. *Domicile.* Rights, liabilities, and remedies frequently depend upon, and vary according to, the "domicile" of a person, and it is important, therefore, to understand the meaning of that term.<sup>5</sup>

In the common acceptance, domicile means the place where a person resides; but in a legal sense it means the place where a person has his fixed and permanent home or establishment. Two things must concur to constitute domicile, namely, actual residence, and the intention of remaining; or, in case of temporary absence, the intention of returning; and as there must be this concurrence of fact and intention, the question of domicile is often a difficult one. The most general rules on the subject

4. Robinson Elem. Am. Jur. § 24 *et seq.*

5. See 14 Cyc. 833.

"The nature of political society requires that every member of it must have his political abode within the territory over which it exercises sovereignty, although he may be physically absent from it; and when its territory is divided into minor districts which limit the local jurisdiction of its courts, the precincts of

its executive officers, the enjoyment of the elective franchise, the imposition of taxes, and other governmental operations, or in which special rules control the ownership and transmission of property, it is necessary that every person should be so related to one of these districts, to the exclusion of all others, that his legal privileges and obligations may at any moment be precisely ascertained." Robinson Elem. Am. Jur. § 66.

are these: The place where one is born is his domicile, if it was the domicile of his parents; if not, their domicile is his during minority, unless changed by the parents. A married woman has the domicile of her husband. Residence is *prima facie* evidence of domicile; but no length of time is essential; and, therefore, if an adult person removes to a new residence, with the intention of remaining, it becomes his domicile immediately. Every person must have a domicile somewhere; and, therefore, when a domicile has once been acquired, it continues until a new one is acquired.<sup>6</sup>

§ 62. **The Fundamental Rights in Rem — a. In General.** There are three general rights *in rem* which are so universally recognized by free governments that they may be regarded as fundamental rights. They are: (1) The right of personal security; (2) the right of personal liberty; and (3) the right of private property. History has devoted many of its most interesting pages to an account of the struggle of peoples for the recognition of these fundamental rights. In England they are attested by a long line of constitutional documents, beginning with Magna Charta (1215), and often forced from arbitrary rulers at the point of the sword. In America they find expression in the constitution of the United States, and in the constitutions of the individual States.<sup>7</sup> And it may be said that their existence is now recognized in the laws and traditions of all western civilized nations.

**b. The Right of Personal Security.** The right of personal security is the right of freedom from injury to life, limb, body, health, or reputation.

Human life is universally recognized as every man's natural right, unless he has so conducted himself that his existence is a menace to the community, when the state will sometimes deprive him of it. All other rights presuppose this one. Next to the safety of the state itself, the life of man is cherished by all free governments.

The limbs are those parts of the human frame which are useful in fight. The body includes all other parts. The limbs include the arms, legs, eyes, front teeth, and all parts, the deprivation of which would render one less able to defend himself. The distinction between the limbs and the body is not always clear. It would seem that there is no part of the frame, a serious injury

6. Walker Am. L. § 255.

Domicile may be divided into (1) *domicile of origin*, being that which every infant has upon attaining majority—the domicile of his parents at that time; (2) *domicile of choice*, being that which the individual has

elected and chosen for himself to replace the domicile (whether of origin or of choice) previously obtained; or (3) *domicile by operation of law*, being that of a wife arising from marriage. See 14 Cyc. 837, 838.

7. See *infra*, § 63.



to which would not impair the individual's fighting power; but, where the part is such that an injury to it would affect this power only indirectly, it would not be classed as one of the limbs. An injury which involves a loss of limb is called a mayhem. When a person is threatened with an injury to life, limbs, or body, it is his right to defend himself. When his life or limbs are endangered, he may even go to the extent of taking the life of his assailant, when that is absolutely necessary for his own protection. But he is not justified in killing another when he apprehends an injury to his body only. And in any case, in order to justify any act of self-defense, there must have been reasonable ground to believe that personal violence was intended on the part of the aggressor.

The right of immunity from undue injuries to health is also an element of the right of personal security. Thus, the giving to another of impure or poisoned food is a violation of this right; and, when a person so uses his premises as to engender noxious or otherwise injurious odors, the general health of the neighborhood is endangered, and such use is in violation of the law.

Not only has every individual the right to be exempt from such injuries as affect him physically, as in the above cases, but he is also protected from unjust attacks upon his good name. When such attacks are made in writing, or through a printed newspaper or other periodical, or a printed book, the injury is called a libel. When they are committed by means of spoken words or by actions, it is denominated a slander. And, whether it take the form of libel or of slander, any unjust attack on a person's reputation will be redressed by the courts.

**c. The Right of Personal Liberty.** The right of personal liberty is the right of an individual to act with freedom, except so far as he is restricted by the law. The word "liberty," as used by our revolutionary forefathers, included all of the fundamental rights — those inalienable rights which are necessary to the pursuit of happiness. It is not infrequently used in this sense in the law. But, when the right of personal liberty is referred to, there is no intention of including the right to life or of property within the term. Writers on morals tell us that every man should have perfect freedom of movement, so far as his actions do not interfere with a like freedom on the part of his fellow-men. And this is the spirit of the law. But in this connection, as elsewhere, it is necessary to remember that moral rules are effective in the law only so far as the state has impressed upon them the character of legal rules. Instead, therefore, of the vague principle that one may act so far as he does not interfere with the right of another to do the same, we have the more definite rule

that one may act so far as he is not restricted by the law. Any violation of this right to act is a violation of the right of personal liberty, and is called a false imprisonment.

d. **The Right of Private Property.** The right of private property is the right of an individual to possess and own things unconnected with his person. This right of private property will be discussed in detail in a subsequent chapter.<sup>8</sup>

§ 63. **Constitutional Guaranties of the Fundamental Rights —**

a. **In England.** In England the fundamental rights *in rem* are guaranteed in the constitution. The principal documents in which they are recognized are the Magna Charta, the Bill of Rights, the Petition of Right, and the Habeas Corpus Acts. Taken together, these documents are often said to be the basis of English liberty. Magna Charta is often pointed to as the beginning of the development of English liberties. It was forced from King John in 1215, on the plain of Runnymede. It contains sixty-three articles, and, with few exceptions, each article recognizes some distinct right. Articles 39 and 40 are the most celebrated and the most fundamental. They are as follows:

Art. 39. "No freeman shall be taken or imprisoned or disseized or outlawed or banished or any ways destroyed, nor will we pass upon him, nor will we send upon him unless by the lawful judgment of his peers, or by the law of the land.

Art. 40. "We will sell to no man, we will not deny or delay to any man, either justice or right."

These two articles Mr. Hallam calls the "essential clauses" of the Great Charter, being those which "protect the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation."

The Bill of Rights and the Petition of Right are in a sense supplementary to the Magna Charta — passed, however, at a much later day. The Habeas Corpus Acts were designed to secure to the people the right of personal liberty. "On these," says Mr. Dicey, "rest an Englishman's security for the enjoyment of his personal freedom." The chief of these acts was passed in the reign of Charles II, and applies particularly to persons arrested on a charge of crime. A later act was passed in the reign of George III, and applies to all other cases of imprisonment. The two acts, taken together, form a guaranty that no person shall be kept in confinement an undue length of time, except by due process of law.

b. **In the United States.** In the United States various provisions exist in the federal constitution, the object of which is to guarantee the observance of the fundamental rights, and in the constitutions of most of the States there are what are called bills of

<sup>8</sup>. See *infra*, § 64 et seq.

rights, in which an attempt is made to state systematically the fundamental rights of man.

The most general statement of the fundamental rights is found in the Declaration of Independence. That document says: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; and that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed." In the constitution of the United States there is no such general statement, and the citizen is left to deduce from various disconnected clauses the charter of his rights. The fourteenth amendment, however, provides that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." There are also clauses which guarantee freedom of religious belief, of speech, and of the press; the right of the people peaceably to assemble, and the right of petition to the government; the right to bear arms; the right to be secure from unreasonable searches; the right of trial by jury; and various other provisions regulating the conduct of trials for crime. The constitution further provides that the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it; and that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."<sup>9</sup>

In most of the State constitutions there is a more systematic attempt to define the rights of the people than is aimed at in the constitution of the United States; and the provisions designed for that purpose are usually collected together, and called the bill of rights. The danger of encroachment upon these fundamental rights is twofold: (1) That of encroachment by the governmental power; and (2) that of violation by private individuals. We have seen that the United States government has only such powers as are conferred upon it by the federal constitution, either expressly or by necessary implication. It is natural, therefore, that its authors should not regard it as so necessary to provide in that instrument for governmental encroachments upon private rights as it might be in formulating a constitution for a state which has all power of government unless restricted. Both the federal and State constitutions, however, contain ample guaranties against either public or private encroachment upon the fundamental rights of security, liberty, and property.<sup>10</sup>

9. See *supra*, § 40.

10. See 8 Cyc. 1080 *et seq.*

## CHAPTER VI

### PROPERTY

- § 64. Property in General.
- 65. Historical Phases of Property.
- 66. The Feudal System.
- 67. Ownership and Possession.
- 68. Limitations on Ownership.
- 69. Corporeal and Incorporeal Property.
- 70. Real and Personal Property.
- 71. Fixtures.
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§ 64. **Property in General.** The subjects of law are either persons or things. A thing may be defined as any portion of matter or creation of the law which does not possess inherent legal rights. The word "property" is used in the law in two senses: (1) As synonymous with the word "thing"; and (2) as denoting the ownership of a thing, as distinguished from the mere naked possession.

In seeking the means for securing his highest welfare, man reaches out and takes hold of the objects of the material world. The supremacy of the human race over the lower animals and all inanimate matter is so universally recognized that it is embodied in all philosophies, all religions, and all systems of law. It is, therefore, a fundamental distinction which separates persons and things from each other — the one including those existences which are possessed of legal rights, that is, the ruling elements; the other, those which are merely the objects of personal control. Things, as such, have no legal rights. All rights in them are rights of persons. Not only does the class of things include inanimate objects and animals, but it comprehends also such intangible existences as rights themselves.<sup>1</sup> To this entire class of objects technically called things, popular usage has given the name "property," and this usage of the term is also common in the law. The same word, "property," is, however, used by legal writers to denote the permanent and stable ownership in a thing, as distinguished from its mere naked possession.<sup>2</sup>

§ 65. **Historical Phases of Property.** Property has, at different stages in the development of civilization, been held by men in three distinct ways, corresponding to three different types of social philosophy: (1) Anarchy; (2) communism or socialism; and (3) individualism.

1. See *infra*, § 69.

2. See *infra*, § 67.

(1) Under the anarchic system, things were regarded as the proper objects of temporary possession only, and not of permanent ownership.

(2) Under the communistic or socialistic system, the right of permanent ownership in things was recognized to be in organized groups of persons, but not in individuals.

(3) Individualism is the name applied to that social system in which things are regarded as capable of permanent ownership by individual persons. Things so owned or possessed are called collectively private or individual property; and so common has this form of ownership become in modern times that the right of private property takes its place among the fundamental rights *in rem*.<sup>3</sup>

The purely anarchic conception of property was confined to the primitive hordes, and exists at the present day only among those tribes which are absolutely savage. Travelers have found absolute anarchy, so far as property is concerned, among the Vedahs of Ceylon, the Bushmen of South Africa, and the inhabitants of Tierra del Fuego. It is supposed that communistic property was the next stage in the development toward individualism. Various attempts have been made in modern times to secure the adoption of a communistic system of property, but with little success so far as christian nations are concerned. The property system of those North American Indian tribes which have not been strongly influenced by their contact with the whites seems, however, to be socialistic in its nature. Modern civilization is based upon private property. "Just as men," says Montesquieu, "have renounced their natural independence to live under political laws, they have also renounced the natural community of goods to live under civil laws. The former laws give them liberty; the latter property."<sup>4</sup> It is, therefore, private property only which is to be considered in the study of modern law.

§ 66. **The Feudal System.** Before leaving the historical phases of the institution of property, it is necessary to glance for a moment at the feudal system. This was a system of holding prop-

3. As to fundamental rights *in rem* see *supra*, § 62.

4. "The third absolute right, inherent in every Englishman," says Blackstone, "is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be more fully ex-

plained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty." 1 Blackstone Comm. 138.

erty which was in vogue during the middle ages, and whose principles have exercised a great influence on the modern law of things. Its leading characteristic was that all lands were held directly or indirectly from the sovereign prince by tenure. Tenure signifies the conditions on which a parcel of land is held, and was of various kinds, differing according to the relation which existed between the tenant and his feudal lord. The feudal system was introduced into England by William the Conqueror, in 1066, and continued, although with many modifications, until the passage of the statute of 12 Car. II, which enacted that, with certain exceptions, "all sorts of tenures, held of the king or others, be turned into free and common socage."<sup>5</sup>

This system grew out of the conditions of society when the barbaric nations of northern and eastern Europe poured over the western countries. The spirit of the times was military. The conquering prince, after having subdued the inhabitants of a particular territory, and wishing to bind his followers to himself so closely that he would be safe in his new position, was accustomed to parcel out his newly acquired land among his generals, on condition that they would support him in his wars. Those to whom the lands were given directly by the prince were called tenants *in capite*, or tenants in chief, because they were the chief men of the feudal state. The tenure by which the tenants *in capite* originally held was called in England tenure in chivalry, or tenure by knight service. The conditions of their holding were usually that they should aid the prince on the battlefield, furnishing, when called upon, a certain number of men; and that they should render dues of various kinds for the support of the feudal government. It was customary for each tenant in chief to subdivide his portion, distributing the greater part of it among subtenants, on similar conditions of tenure to those which he himself was under obligation to perform to the sovereign. In this way a vast social structure was erected, with the king or prince at the apex, his tenants *in capite* directly beneath him, and so on down, through the various classes of subtenants, until we reach the class which actually cultivated the soil. Beneath these there were the serfs or slaves, consisting chiefly of the conquered race or their descendants. This was the typical social organization of the middle ages.

Into England this system was introduced by William the Conqueror, at the Norman Conquest, in 1066, A. D. This king acquired by forfeiture the lands of those who had opposed him in his war of conquest. These he distributed among his Norman

5. 2 Blackstone Comm. 44 et seq.

barons, as feuds.<sup>6</sup> Many of the independent proprietors soon after came forward, surrendered their lands to William, and received them back as his tenants. In this way most of the lands of England became subject to feudal tenure, although, as William did not force the system on his subjects, there were a limited number of parcels which seem never to have been held of a superior. These lands are said to be allodial<sup>7</sup> or independent possessions. The feudal system existed in full force in England during the reigns of William the Conqueror and his immediate successor; but from the ascension of Henry I, it began to lose its strictly military character. Since that time it has been crumbling, until at the present day it exists only in the traces of it which linger in the property laws of those countries which were formerly subject to it.

The essence of tenure by knight service was that the services to be rendered were uncertain, either in the time when they were to be rendered or in the nature of the acts themselves, which, however, were invariably honorable, or such as it would become a knight to perform. By the side of this tenure there gradually grew up in England what was called tenure by socage, a term derived, as Blackstone states, from the Saxon word "soc," meaning privilege. The privilege involved in this new species of tenure was chiefly that while, in most cases, the services were none the less honorable, they were certain both in time and character, not depending on the caprice of the feudal lord. There were various other tenures known to the English law, differing in details from the two typical forms which have been described. As civilization progressed, the desire to do away with all forms of strictly military tenure increased, until, in the twelfth year of the reign of Charles II, all of those tenures were turned into free and common socage, and the feudal system in England was a thing of the past.<sup>8</sup>

It would require, however, only a very cursory glance at the modern law of property to see that, widely separated as it may be from the law of feuds, it is yet the historical successor of that system. We took our common law from England at a time when the purely feudal tenures had been abolished less than a century. In this country tenure is not recognized; but the terminology used in modern conveyances, as well as many of the rules which are daily administered by our courts, may be traced back, through the English law, to the feudal system of the middle ages.

6. "Feud" means the same as "fee" and signifies an estate in land held of a superior on condition of rendering him service.

7. "Allodial" means free; not held

of any lord or superior; owned without obligation of vassalage or fealty. It is the opposite of feudal.

8. 2. Blackstone Comm. 79.

§ 67. **Ownership and Possession.** The distinction between ownership and possession of property is of great importance in the law and must be clearly understood by the student. By the ownership or property<sup>9</sup> in a thing is meant the right of absolute control over it, subject only to such limitations as may be imposed by law or by the owner's own voluntary act. Possession, on the other hand, is the mere immediate corporeal holding of a thing. It may be rightful, in which case it is usually by permission from the owner, or wrongful, when it is in violation of the owner's rights. The right of possession is always an incident of ownership, unless that right be parted with by the act of the owner or by the operation of some rule of law.

There may, of course, be ownership without possession, or, on the other hand, possession without ownership. This may be illustrated by the case of one who leases his property to another. The rightful possession of the property is in the lessee, although he has no ownership therein. The lessor, on the contrary, retains the ownership of the property, although he has neither the possession nor the right to the immediate possession. He may sell it, but such a sale is always subject to the lessee's right.<sup>10</sup>

§ 68. **Limitations on Ownership.** The owner of property has the right to control it absolutely, except so far as it is necessary for the welfare of the community that his power over it be restricted. The chief limitations on his control over his own, as recognized in the American law, are as follows:

(1) The owner must so use his property as not to interfere with the rights of others. This limitation is embodied in the Latin maxim, "*Sic utere tuo ut alienum non laedas*"—so use your own as not to injure your neighbor. This is entitled to be regarded as the legal golden rule. It is a maxim upon which are based a great number of legal principles.

(2) With certain exceptions created by statute, all of a man's property may be taken by due process of law for the satisfaction of his just debts. Formerly the English law punished debt by allowing the debtor to be imprisoned at the expense of the creditor until the debt was satisfied. This rule was abolished in England in 1838, and it is not now in force in the United States except, in some States, in cases of fraud.<sup>11</sup> At the present time the creditor has no way of securing satisfaction except out of the debtor's property. Furthermore, statutes in England and this

9. As we have seen, the word "property" is used in the law in two senses; first, as synonymous with the word thing, and second, as denoting the ownership of a thing, as dis-

tinguished from the mere naked possession. See *supra*, § 64.

10. Holland Jur. 161, 177.

11. See 3 Cyc. 898; 8 Cyc. 879.



country provide that not all property of the debtor may be taken for this purpose, but that a certain portion of it shall be exempt from seizure. The amount and character of this exemption differ in different jurisdictions.<sup>12</sup>

(3) Every owner of property holds it subject to the right of taxation on the part of the government. This right may be defined as that attribute of sovereignty by virtue of which the state may demand and take from its subjects such portions of private property as are necessary for the proper maintenance of government.<sup>13</sup>

(4) He also holds it subject to the right of eminent domain; that is, the right which the state, or some natural or artificial person authorized by the state, such as a railroad company, for example, has to purchase, with or without the owner's consent, any particular portion of private property when such property is necessary for the public use.<sup>14</sup>

(5) He holds it, moreover, subject to the police power of the state. By this is meant the power, inherent in sovereignty, to make reasonable regulations for promoting the general welfare of the public.<sup>15</sup>

12. See 18 Cyc. 1639; 21 Cyc. 448.

13. See "Taxation," — Cyc. —.

14. See 15 Cyc. 543.

15. See 8 Cyc. 863.

It is extremely difficult to assign definite limits to the police power. Bentham, at page 169, Pt. 9, of his collected works, describes it as follows: "Police is, in general, a system of precaution, either for the prevention of crimes or of calamities. It is destined to prevent evils and provide benefits. Its business may be distributed into eight distinct branches: (1) Police for the prevention of offenses; (2) police for the prevention of calamities; (3) police for the prevention of endemic diseases; (4) police of charity; (5) police of interior communications; (6) police of public amusements; (7) police for recent intelligence; (8) police for registration,—for preserving the memory of different facts interesting to the public."

It applies to the regulation of lotteries and a vast variety of subjects. See *Stone v. Mississippi*, 101 U. S. 818.

The following explanations by two leading courts will throw light on the subject: "Rights of property, like all other social and conventional

rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is a very different thing from the right of eminent domain,—the right of a government to take and appropriate private property to public use whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power,—the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same." *Com. v. Alger*, 7 Cush. 53, 85.

"The power of the state over the property of the citizen . . . is well defined. The state may take his property for public use, upon just

It is sometimes said that the rights of taxation and eminent domain are the relics of feudal tenure. But they are rather essential incidents to any successful government, whatever may be its form. In fact, these two rights, together with the police power, were known to the laws of ancient Rome centuries before feudalism appeared in Europe.

§ 69. **Corporeal and Incorporeal Property.** As to its tangibility, property is divided into corporeal and incorporeal. Corporeal property is that which is visible and tangible. Incorporeal property is that which is invisible and intangible in its nature. It includes rights to corporeal things or to some benefit to be derived therefrom, as distinguished from the things themselves.<sup>16</sup>

The distinction between these two classes of property is a fundamental one. All things are either tangible or intangible; they may or they may not be seen. It is not necessary to dwell at this point on the nature of corporeal property. We have no difficulty in recognizing it. It is that which we see about us on all sides, and are constantly using, buying, and selling. Examples of it are lands, houses, furniture, and trees. A word is necessary, however, as to the nature of incorporeal things. They are intangible rights, existing only in contemplation of law. It is obvious that this class of property is an incident of a more or less artificial state of civilization. It was difficult for primitive men to deal with things which their hands could not grasp nor their eyes see. Things incorporeal were, however, recognized by the Roman

compensation being made therefor. It may take a portion of his property by way of taxation for the support of the government. It may control the use and possession of his property as far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property. The doctrine that each one must so use his own as not to injure his neighbor—*sic utere tuo ut alienum non laedas*—is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of state authority. Except in cases where property may be destroyed to arrest a conflagration or the ravages of a pestilence, or be taken under the pressure of an immediate or overwhelming necessity to prevent a public calamity, the power of the state over the property of the

citizen does not extend beyond such limits. It is true that the legislation which secures to all protection in their rights and the equal use and enjoyment of their property embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the 'police power' of the state, which from the language often used respecting it one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals, in their intercourse with each other and in the use of their property, so far as may be required to secure these objects." *Munn v. Illinois*, 94 U. S. 113, 145.

16. 2 Blackstone Comm. 20.

jurists in the time of Justinian, and with the development of the modern commercial spirit, they have become an important factor in civilization.

It has been said that these incorporeal rights relate to corporeal property. A few examples will make this clear. The ownership of land may be in one person while the right to pass over it is in another. Both the land and the right of way are property; but the former is corporeal, while the latter is incorporeal. Again, let us suppose that a man owes another a debt, which is overdue. The creditor has the intangible right to payment, which is, of course, incorporeal. When payment is made the incorporeal right ceases. The corporeal property comes into his possession.<sup>17</sup> Other examples of incorporeal property are franchises, annuities, rents, etc.<sup>18</sup>

§ 70. **Real and Personal Property.** In the Roman law, property was divided into movables and immovables. Under the feudal system, movable property was known as "goods and chattels," while immovable property was called "lands, tenements and hereditaments." In the modern English and American law, immovable property is called "real property," while that which is movable is known as "personal property." Real property is therefore defined by Blackstone as, "such as is permanent, fixed, and immovable, which cannot be carried out of its place; as lands and tenements." Personal property is defined by the same distinguished author as, "goods, money, and all other movables, which may attend the owner's person wherever he thinks proper to go."<sup>19</sup>

The division of property into movable and immovable is equally as fundamental as that into corporeal and incorporeal, and it was certainly recognized much earlier in history. It seems natural to draw a distinction between land, which is incapable of being destroyed or carried away, and cattle, which may be transferred from one place to another or killed. These two things, land and cattle, seem to have been the leading forms of property in primitive times. In process of time, the term "lands" came to include not only the soil, but also rights issuing therefrom, as well as houses and other things permanently annexed thereto. The term "goods and chattels" corresponds very closely to the "*res mobiles*," or movable things, of the Roman law. It was a comprehensive term, including all property which was not regarded as permanent and stable in its character.

The terms "lands," "tenements," and "hereditaments" had a legal meaning quite different from their ordinary signification.

17. See *infra*, § 224.

18. See *infra*, § 190.

19. 2 Blackstone Comm. 15.

"Lands" included not only the soil itself, but also the space above it, as well as houses and things permanently annexed, and extended down to the center of the earth. "Tenements" was a term of still wider signification, including all property which might be held of a feudal lord. It included not only lands, but also various incorporeal kinds of property. "Hereditaments" is still more comprehensive, consisting of anything which can be inherited. An heirloom, for example, descended to the heir, and thus, although essentially a movable, was classed with immovables, for only the latter were strictly inheritable. The terms "real" and "personal," as applied to property, came into use at a later date. It is sometimes said that immovable property was called "real," because when the owner was deprived of the possession he could recover the real thing itself, rather than mere damages, as is usual in the case of personal property. Perhaps the true reason is that, at the time when the term was adopted, this species of property was the only one which was regarded as of a real or substantial kind. Goods and chattels were shifting and unreliable, according to the opinion of that age. They were called "personal," perhaps, because they were capable of attending the owner's person wherever he might go. One of the most striking sociological movements of modern times is the development of personal property. In feudal times it was counted as of an importance entirely inferior to land. But the feudal spirit has vanished, and movables now constitute a large percentage of the world's wealth.

§ 71. **Fixtures.** A fixture is an article of personal property physically annexed to land in such a way as to become a part thereof. By such annexation it assumes the nature of real property.

The distinction between real and personal property is in most instances clear; but it often happens that a particular article may be personal under some conditions and real under others. This occurs usually when a personal thing is attached to realty in such a way as to change its character from movable to immovable; the term "fixtures" is used by the majority of courts and writers on the subject to designate that personal property which thus becomes real by annexation. There are some courts which have used the term in an opposite sense, as meaning that personalty which, although annexed, yet retains its personal character; but these are in the minority, and the settled meaning of the word is as first stated. This usage seems not only preferred by the authorities, but is more in conformity with the general popular meaning of the term. A fixture is that which is fixed. Its mean-

ing involves a stability which is not consistent with its retaining its movable character.<sup>20</sup>

§ 72. **Things Not the Subject of Individual Ownership.** While most things are the subject of individual ownership, there are, as pointed out by Blackstone, a few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being of such a nature that nothing but an usufructuary property is capable of being had therein; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such, among others, are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences. Such also are those animals which are said to be *feræ naturæ*, or of a wild and untamable disposition, which any man may seize upon and keep for his own use and pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any other man has an equal right to seize and enjoy them afterward.<sup>21</sup>

20. The authorities supporting this view are numerous. See *Cook v. Whiting*, 16 Ill. 480; *Bartlett v. Wood*, 32 Vt. 372. *Contra*, *Washburn Real Prop.* 18. Some writers suggest a compromise between the

definitions, by drawing a distinction between movable and immovable fixtures, or between real and personal fixtures. See 19 Cyc. 1033.

21. 2 Blackstone Comm. 14.

## CHAPTER VII

### CLASSIFICATION OF THE LAW

#### § 73. In General.

- 74. Substantive and Adjective Law.
- 75. Public and Private Law.
- 76. Public Substantive Law.
- 77. Private Substantive Law.
- 78. Public Adjective Law.
- 79. Private Adjective Law.
- 80. Summary.

§ 73. In General. When it is sought to reduce the large mass of legal rules to systematic form, and to classify them, various difficulties present themselves. Two different methods have been pursued by legal writers. The first of these, which may be called the scientific method, is adopted by the authors of works on analytical jurisprudence. It is based on the deductive plan. In it terms are used which, while they have an exact scientific meaning, are unknown in many instances to the practical lawyer. The second method, which may be called the popular method, is inductive in its character. It aims to use the topics already universally known in the law, grouping them together, until all the rules which are ordinarily administered find a place in one or the other of several leading groups. This latter method is adopted in the present chapter. There are two general divisions of the law, however, which are recognized under both the scientific and the popular systems of classification. One of these is that into substantive and adjective law; the other, that into public and private law.

§ 74. Substantive and Adjective Law. Substantive law is that which creates and defines legal rights. Adjective law is that system of rules which provides for and regulates the enforcement of rights and the redress of wrongs.

It is obvious that there are radical distinctions between those rules which serve to determine what rights are possessed by persons and those which serve merely to provide methods by which those rights may be protected and enforced. The substantive law, on the one hand, is necessarily abstract, while the adjective law is concrete, regulating as it does the machinery of the courts, or, in other words, the method by which the substantive law is applied to particular cases. Without the adjective law, the substantive law would be of no effect, while without the substantive law the adjective law would have no reason for its existence.

§ 75. **Public and Private Law.** Public law is that system of rules governing the rights of the state and regulating the relations of the state with its subjects or citizens. Private law includes all rules which regulate the relations of subjects between themselves. The division of law into public and private originated with the Romans. In the civil law, such was the transcendent importance of the Roman government that public law for a long time overshadowed the rules relating to private affairs. In our own country, however, private law is of paramount importance. While individuals are only occasionally brought into direct relations with their government they are constantly dealing with each other, and the rules regulating such intercourse must necessarily be very numerous. Public law, as well as private law, may be divided into the substantive and adjective branches. We have, then, public substantive law, private substantive law, public adjective law, and private adjective law. Under these four heads, an attempt will be made to group the ordinary topics with which the lawyer has to deal.

§ 76. **Public Substantive Law.** The public substantive law divides itself naturally into two general topics, one included under the general terms constitutional and administrative law, and the other known as criminal law. Constitutional law, in the United States, is that branch of the legal system which deals with the construction and interpretation of federal or state constitutions. Administrative law is that branch of the legal system which regulates the methods by which the functions of government are performed. It includes many rules of constitutional law, and, in addition to them, various statutory enactments. The unwritten law also furnishes numerous rules of administration. Constitutional law furnishes rules governing the administration of public affairs; but its rules are of a very fundamental kind. From the very nature of constitutions, they cannot furnish rules regulating details. Constitutions, however, are not confined to mere administrative matters, but usually include bills of rights and various other guaranties and regulations.<sup>1</sup> Constitutional and administrative law overlap each other at certain points. It is convenient, however, to distinguish between them.

Criminal law is that branch of the legal system which deals with offenses which are so important that the state punishes the offenders in its own name.<sup>2</sup> From one point of view the criminal law relates to dealings between subject and subject. But, as will be seen later, the law regards a crime as an injury primarily to the state or community. It is the duty of the state to protect its subjects, and it does not wait until its aid is invoked by an

1. See *supra*, §§ 40, 43; *infra*, § 81  
*et seq.*

2. See *infra*, § 85 *et seq.*

injured person, but will in the case of crime step in and punish the offender on its own responsibility. The law of crimes, therefore, is properly classified as a branch of the public law.

§ 77. **Private Substantive Law.** Private substantive law may be conveniently classified under four heads: (1) The law relating to persons and personal and domestic relations. (2) The law relating to property and property rights. (3) The law relating to contracts. (4) The law of torts or private wrongs.

In grouping the principal topics which are familiar to the practical lawyer under these general divisions, it is not to be expected that the divisions will be exclusive of each other. There are, of course, certain subjects which relate chiefly to the rights of persons as such. There are others which refer almost exclusively to rights in property; as, for example, those containing the rules which determine the rights incident to ownership, and which regulate the transfer of property. There are others, as we shall see, in which the rights of persons and the rights of property coalesce. So also the subject of contracts and the subject of torts relate directly to each of the other general divisions. The grouping of the various subjects of private substantive law under these four general divisions must, therefore, be merely for convenience.

Under the law of persons and personal and domestic relations we may properly group the laws relating to husband and wife, parent and child, guardian and ward, and master and servant. The rules governing the first three of these relations, and to some extent the fourth also, are usually discussed under the title "domestic relations." The term "domestic relations" indicates that the topics included within it are such as relate to the private affairs of life. The law of parent and child grows naturally out of that of husband and wife, and depends to a certain extent upon it. The law of guardian and ward applies to an artificial relation which is created when the natural relation of parent and child is broken up. It will, perhaps, seem strange at first sight that the relation of master and servant should have been classed in the same group as the law applicable to relations growing directly out of the family. But the reason of this will be clear when it is remembered that at the time when the common law was in its formative stage servants were usually domestic servants, forming a part of the ordinary household. At the present time, however, the relation of master and servant is not properly a domestic relation.

We may also group under the head of persons and personal relations the law relative to particular classes of persons, such as infants, insane persons, etc.; the law relating to agency; the law relating to artificial and associated persons — corporations, partnerships, and unincorporated associations; and the law relat-



ing to particular occupations. It is obvious, however, that all of these topics cover much that may properly be also classified under each of the other headings — property and property rights, contracts, and torts.

The law relating to property and property rights may be conveniently divided into that relating to real property, that relating to personal property, and that relating to succession to property after death. In connection with property, whether it be real or personal, there will naturally arise two questions for determination: (1) The rights which the owner may have in his property; and (2) the methods by which those rights may be transferred to others. The first general class of rights is sometimes referred to as rights at rest; the second, as rights in motion.

When a contract is made it establishes a relation which may be principally of a personal character, or may, on the other hand, involve chiefly rights in property. However, in as much as whether the contract has persons or property as its principal subject-matter, it is governed by the same general principles, it is more convenient to consider the subject of contracts as a distinct class than to subdivide it so as to bring it partly within the laws relating to personal rights and partly within the laws of property. The principal subjects which may properly be grouped under the law relating to contracts are contracts generally, sales, bailments, commercial paper, guaranty and suretyship, insurance, and other special contracts. The subject of contracts is the foundation of commercial law. There is no other subject involved in business transactions which is not based upon it. The subject of sales involves the transfer of personal property in consideration of money. It is a transfer of the ownership of the property. In the case of bailment, there is a transfer of the possession only, while the ownership remains in the bailor. The subject of commercial paper involves the discussion of a peculiar species of contract which was developed under the law merchant and adopted into our law from that system. The subjects of guaranty and suretyship, insurance, etc., involve a discussion of the special rules applicable to those particular contracts.

The subject of torts relates directly to each of the other three general divisions. There may be torts to the person, torts to property, and torts which violate rights growing out of contracts.

**§ 78. Public Adjective Law.** The public adjective law includes chiefly the two topics of "Criminal Procedure" and "Extraordinary Remedies." We have seen that the criminal law is a branch of public law, for the reason that the state punishes violations of it in its own name. Criminal procedure is the name applied to the collection of rules regulating the methods by which the punishment of criminals is accomplished. This procedure

naturally divides itself into two parts, the first regulating the mode of determining upon the guilt or innocence of a person charged with crime, the second regulating the method of punishment after the accused has been found guilty.

The leading extraordinary legal remedies are the writ of mandamus, the information in the nature of a quo warranto, and the writ of prohibition. A writ of mandamus is a writ issued in the name of the sovereign or sovereign body, commanding the performance of some duty on the part of the person to whom the writ is directed. An information in the nature of a quo warranto is in form a criminal proceeding. Its object is to test the right of a corporation or public officer to exercise the functions which are assumed by such corporation or officer. A writ of prohibition is a writ whose purpose it is to test the jurisdiction of a court and prevent such court from exceeding its jurisdiction. These extraordinary remedies were originally the means used by the king to regulate the actions of his subjects, and would not issue merely on petition of the subjects themselves. At the present time, however, this prerogative character has been discarded, and, while the theory of the writs is much the same, they are usually issued at the instance of private citizens at a matter of right.

§ 79. **Private Adjective Law.** The private adjective law includes the various rules applicable to the enforcement of the rights of citizens against each other. It regulates the following principal methods of procedure: (1) Common-law procedure; (2) equity procedure; and (3) code procedure. The distinction between the common law and equity has already been explained.<sup>3</sup> Under the English system, these two different bodies of law were administered in distinct courts and in different ways. The same distinction in procedure is observed in a large proportion of the States in this country. In some States, however, there have been adopted codes of procedure, in most of which the distinction between legal and equitable forms is abolished. There are, therefore, these three distinct systems which must be considered in a discussion of private adjective law. There are, however, a number of other peculiar systems, of more or less importance, in vogue in some of the courts. Thus admiralty procedure is somewhat different from any of the leading systems which have been mentioned. Probate procedure is also different in many respects. And various others might be mentioned.

In most of the American States which profess to have adopted the common-law procedure, numerous modifications of that system have been made. In some States, as in Michigan, it still retains in the main its English features. In others, as in Maryland, such important changes have been made that the name of

3. See *supra*, §§ 33-37.

the system has been changed. In that State it is called the "Maryland simplified procedure." Different as our own systems may be, however, from the practice of the English courts, it is yet to that practice that the American lawyer looks for the essential principles of our own.<sup>4</sup>

§ 80. Summary. To summarize what has been said in the preceding sections we may classify the law for the purpose of our elementary treatment as follows:

- I. Public Substantive Law.
  - A. Constitutional and Administrative Law.
  - B. Criminal Law.
- II. Private Substantive Law.
  - A. Persons and Personal and Domestic Relations.
    - 1. Domestic Relations.
      - a. Husband and Wife.
      - b. Parent and Child.
      - c. Guardian and Ward.
    - 2. Master and Servant.
    - 3. Principal and Agent.
    - 4. Infants.
    - 5. Insane Persons.
    - 6. Drunken Persons.
    - 7. Aliens.
    - 8. Convicts.
    - 9. Persons in Particular Occupations.
    - 10. Artificial and Associated Persons.
      - a. Corporations.
      - b. Partnerships.
      - c. Joint Stock Companies.
      - d. Unincorporated Associations.
  - B. Property and Property Rights.
    - 1. Corporeal and Incorporeal Hereditaments.
    - 2. Estates in Real Property.
    - 3. Titles to Real Property.
    - 4. Personal Property.
    - 5. Succession after Death.
  - C. Contracts.
    - 1. Contracts Generally.
    - 2. Special Contracts.
      - a. Sales.
      - b. Bailments.
      - c. Commercial Paper.
      - d. Guaranty, Suretyship, and Indemnity.

<sup>4</sup> The above sections have been adopted with some changes from Smith Elem. L. 110 *et seq.*

II. Private Substantive Law — *Continued.*

C. Contracts — *Continued.*

2. Special Contracts — *Continued.*

e. Insurance.

f. Vendor and Purchaser.

D. Torts.

1. Torts Generally.

2. Particular Torts.

III. Public Adjective Law.

A. Criminal Procedure.

B. Extraordinary Remedies.

IV. Private Adjective Law.

A. Common-Law Procedure.

B. Equity Procedure.

C. Code Procedure.

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**PART II**  
**THE SUBSTANTIVE LAW**



## CHAPTER VIII

### CONSTITUTIONAL AND ADMINISTRATIVE LAW

- § 81. Written and Unwritten Constitutions.
- 82. The Construction of Constitutions.
- 83. The Essentials of a Written Constitution.
- 84. Administrative Law.

§ 81. **Written and Unwritten Constitutions.** The constitution of a State may be either written or unwritten. By a written constitution is meant one which has been formally adopted by the sovereign body and reduced to written form. An unwritten constitution is one which has never been thus formally adopted, but consists of those rules which have been habitually observed in the conduct of the government and which have been recognized by the courts as the fundamental law. The leading characteristic of a written constitution is that it is the result of definite acts of adoption on the part of the sovereign body. Its leading features are usually drawn up and approved at one particular time. The adoption of such a constitution, or a radical change in its provisions, is essentially a revolutionary act. This does not mean that a war must precede such a step. In many cases no violence has been resorted to in order to effect the change. Such an act does not necessarily involve a shifting of the sovereign power. The sovereign body may itself decide to revolutionize the institutions over which it has control. From the very nature of such a constitution, however, its adoption will invariably be the result of extreme dissatisfaction with the existing order of things, and it is therefore a revolutionary measure. A purely unwritten constitution is not known to exist at the present time, but there are several leading nations whose constitutions have never been formally adopted in their entirety. The essential feature of an unwritten constitution is that it is a growth, developing in substantially the same way as any principles of the unwritten law. Where such a constitution exists there is usually no important break in the continuity of the national institutions. It is essentially non-revolutionary.

The English constitution is the most notable example of a constitution which has not been formally adopted. The institutions of England are continuous, without radical revolutionary changes, from Saxon times. The present constitution of Germany however, is written, having been formally adopted in 1867. It is



interesting to trace the development of the English constitution, noticing the changes which custom, statute, and judicial decision have worked in it during the thirteen centuries of its existence. We find the germ of the modern parliament in the Witenagemote, which met as early as 596 A. D. The king, similar in many respects to the present sovereign, existed more than a century earlier. The result of the Norman Conquest was not to undermine or revolutionize the constitution as it had previously existed, for William the Conqueror submitted to its customs when he ascended the throne in 1066. Since that time various modifications of the constitution have been brought about, sometimes by war, sometimes by peaceful means. But in all the vicissitudes through which it has passed, it has preserved its identity. On the other hand, the present constitution of Germany is radically different from the constitutions which existed before the formation of the North German Confederation. It was the result of a long struggle for national unity, a struggle which was decided at the Battle of Sadowa, in 1866, when, Austria being defeated, the North German states allied themselves together for the purpose of forming a national government. Existing institutions were overthrown, and the new constitution was established. Nearly four years later the South German states joined the Confederation, and modifications of the constitution became necessary. The name of the state was changed, and it has since been called "The German Empire." While there is an historical relation between the constitution prior to 1867 and that of the present day, legally no such connection exists.

In the United States, both the federal constitution and the constitutions of the individual States are written constitutions. This could hardly be otherwise. The prevailing spirit at the time of the American Revolution demanded a radical change in the form of government. Such a change could not, of course, be effected without the careful preparation of a new plan for the state, and this plan was naturally reduced to written form. It is also difficult to see how any definite division of the powers of government between the State and federal authorities could have been made without a written instrument. The constitutions of the thirteen original States were also written, and the States admitted into the Union since the adoption of the federal constitution have followed their example. As a result, constitutional law, in this country, is practically limited to a construction of the various clauses of these written constitutions.<sup>1</sup>

1. Smith Elem. L. 123-126. For a detailed discussion of the characteristics of the English and German constitutions, see Anson's Law and Custom of the Constitution; Woodrow Wilson's The State.

§ 82. **The Construction of Constitutions.**<sup>2</sup> The rules governing the construction of laws in general and those relating particularly to the interpretation of statutes, which have been previously discussed,<sup>3</sup> apply also to the construction of constitutions. It will be well, however, to note particularly the special application of several of these rules when constitutions are concerned. The highest court of last resort in a particular jurisdiction is the final interpreter of the constitution governing that jurisdiction.

The interpretation of constitutions, as well as of other laws, is essentially a judicial function. In the construction of the federal constitution, the supreme court of the United States is the final authority. The highest court of last resort in a particular State has the ultimate right to interpret the constitution of that State. It often happens, however, that the question arises in a State court as to whether a State statute is in violation of a provision of the federal constitution. In such cases, it is the rule that if the decision of the State court is in favor of the validity of the statute, the case may be removed to the supreme court of the United States for a decision on the constitutional question; but if the decision is against its validity, the construction of the State court will be final.<sup>4</sup>

The interpretation of a clause of the constitution becomes necessary when, in an actual case, it is alleged that a particular statute is contrary to that clause. The federal courts, as well as those of most of the States, will not consider the question of the constitutionality of laws unless cases come before them in which a decision on that point is necessary in order to determine the rights of the parties. These tribunals were not established merely for the purpose of satisfying idle curiosity, nor to lay down general laws. This would be an encroachment upon legislative power. The primary function of the judiciary is to decide actual controversies, and it is only when a question of constitutional construction arises as an incident to such a controversy that it will be considered by the courts.

A statute will be presumed to be constitutional until the contrary is shown.

If part of the statute only is adjudged unconstitutional, and this part is capable of being separated from the remainder of the statute, such remainder will not be rendered invalid, unless the two are so mutually connected that the valid part, standing alone, would not express the true intention of the legislature. Thus, in a leading case, an Illinois statute provided: "If any

2. From Smith Elem. L. 126. As to the construction of constitutions see 8 Cyc. 724 *et seq.*

3. See *supra*, §§ 55, 56.

4. Rev. St. (1878) § 709. See also 11 Cyc. 928; *Cohens v. Virginia*, 6 Wheat. U. S. 264; *Martin v. Hunter's Lessee*, 1 Wheat. U. S. 304.

person shall harbor or secrete any negro, mulatto, or person of color, the same being a slave or servant owing service or labor to any other persons, whether they reside in this State or in any other State, or territory, or district, within the limits and under the jurisdiction of the United States, or shall in any wise hinder or prevent the lawful owner or owners of such slaves or servants from retaking them in a lawful manner, every person so offending shall be deemed guilty of a misdemeanor." The latter part of the section was held unconstitutional and void, because under the constitution of the United States the power to legislate on the subject of fugitive slaves was vested exclusively in congress; but the validity of the first part was upheld on the ground that it was a valid police regulation for the preservation of order in the State.<sup>5</sup>

The construction of constitutions is governed by the doctrine of *stare decisis*. That is, if a certain interpretation has been put upon a clause at one time, such interpretation should not be departed from except for reasons of the greatest weight.

If a statute be declared unconstitutional, it is made void from the beginning. Therefore any rights which may have been acquired under it are of no validity.

§ 83. **The Essentials of a Written Constitution.**<sup>6</sup> All American constitutions consist of two elements: (1) The outline of the form and functions of the different branches of government, and (2) guaranties against governmental encroachment upon the rights of individuals. When these two elements are easily distinguishable from each other, the latter is usually called "The Bill of Rights." Each constitution contains provisions for its own amendment.

It is the characteristic of all written laws, and especially of constitutions, that they are not easily changed. While the common law is ever developing and taking on new forms, statutes are, in the absence of express amendments, as inflexible as the language in which they are written. And so a written constitution, once adopted, cannot be molded to meet new conditions. If change is desired, formal amendment is necessary. Public policy demands that provision should be made for such amendment; for it is not reasonable to expect that the fundamental laws of to-day will forever be appropriate. The power of amendment is the safety valve of the written laws, whose function it is to avert revolution. It is therefore provided in the federal constitution that: "The congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either

5. *Willard v. People*, 5 Ill. 461.

6. *Smith Elem. L.* 129.

case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the senate."<sup>7</sup> By virtue of this provision, as we have seen,<sup>8</sup> fifteen amendments have been made to the federal constitution. The first ten were enacted because of the jealousy of the central government felt on the part of many of the States. They form a bill of rights, the first nine being intended to prevent federal encroachments upon the liberties of the people, the tenth reserving to the States all powers not delegated to the general government, nor prohibited by the constitution to the States. These were adopted in 1789. The eleventh amendment was proposed in 1798; the twelfth, in 1803. The thirteenth, fourteenth, and fifteenth were adopted at the close of the Civil War, and were ratified in 1865, 1868, and 1870, respectively.

§ 84. **Administrative Law.** Administrative law includes all principles, whether constitutional, statutory, or unwritten, which regulate the performance of the functions of government by its officers. It naturally divides itself into: (1) Rules relating to the executive department; (2) rules relating to the legislative department; and (3) rules relating to the judiciary. In England, the two topics of constitutional and administrative law are not very plainly distinguished from each other. In this country, however, while they encroach upon each other's limits to a certain extent, they are essentially distinct; one being based entirely upon the written document which has been adopted as the fundamental law, the other including all rules, even though they may be found in the constitution, which govern the administration of public affairs.<sup>9</sup>

7. U. S. Const. art. 5.

8. See *supra*, § 40.

9. Smith Elem. L. 131.

## CHAPTER IX

### CRIMINAL LAW

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§ 85. Nature of Crime and the Criminal Law in General. The criminal law is that branch of the law which defines crimes, treats of their nature, and provides for their punishment; and a crime is an act or omission so far contrary to public policy that the person guilty thereof is punished for it by and in the name of the sovereign body.<sup>1</sup>

1. See 12 Cyc. 129.

Among other prominent definitions of a crime may be mentioned:

Blackstone: "An act committed or omitted in violation of the public law either forbidding or commanding it." 4 Blackstone Comm. 5.

Bishop: "Any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name." 1 Bishop Cr. L. § 32.

Austin: "An offense which is pur-

sued by the sovereign or by the subordinates of the sovereign." Austin Jur. § 17.

James Wilson: "A crime is an injury so atrocious in its nature, or so dangerous in its example, that, besides the loss it occasions to the individual who suffers by it, it affects, in its immediate operation or in its consequences, the interest, the peace, the dignity, or the security of the public." 3 Wilson Works 4.

We have seen that toward many wrongful acts the government of the State assumes an attitude of indifference, and will notice them only at the suit of a person who feels himself injured by them. These acts are of such a nature that they are supposed to affect private persons only, and are called "torts." But many wrongs, particularly those of a more atrocious character, are injurious to the community at large as well as to the individual who receives the immediate injury. The community as a whole are interested in having such acts suppressed. These wrongs the State forbids and undertakes to prevent by the punishment in its own name of those who commit them. It is to this class of acts that the term "crime" is applied.

Torts and crimes bear a close resemblance to each other, and it is therefore necessary to note carefully the distinction between them. This has been stated in various ways. Some writers lay stress upon the degree of atrocity in the act itself, that which is least atrocious being said to be a tort, and that which is more so a crime. Others emphasize the fact that the one is public wrong, while the other is a mere private wrong. Thus Blackstone says that the distinction between a tort and a crime is this: A tort or private wrong is "an infringement or privation of the civil rights which belong to individuals, considered merely as individuals," while a crime or public wrong is a "breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity."<sup>2</sup> These statements, however, do not bring out the true distinction, for the same act may be both a tort and a crime. The real distinction is found in the respective modes of redress. When an act is made the ground of prosecution and punishment by the State or sovereign on its own responsibility and in its own name, it is a crime. Whenever an act may be made the subject of a private suit for damages, it is a tort. An act which is punishable as a crime may also cause special injury to individuals and give rise to a civil action, if they can show that the injury suffered by them is distinct from that suffered by the general public. The act is then a crime or tort according to the remedy pursued. For example, if A knocks B down, the act is called technically an "assault and battery." B may sue A for damages. For this purpose the act is a tort. A, however, may also be arrested, prosecuted, and punished by the State. For this purpose the act is a crime. There are many other examples, as in the case of a nuisance, a libel, a trespass or conversion amounting also to larceny, embezzlement, or robbery, etc. Under modern statutes

2. 4 Blackstone Comm. 5.

giving a right of civil action for a death caused by wrongful act, even a murder may give rise to a civil action, and therefore be a tort.<sup>3</sup>

§ 86. **How the Criminal Law is Prescribed.** No act can be punished as a crime unless it is prohibited and made punishable by law both at the time of its commission and at the time it is sought to punish therefor.<sup>4</sup> An act may be prohibited and made punishable either by the common law or by statute.<sup>5</sup> In most of the United States the criminal law is partly made up of common-law principles and partly embodied in statutes; some acts being punishable only by statute, while other acts not covered by the statutes, and which were punishable at common law, are still so punishable. In all of the States the common law of crimes has been greatly changed by statute; and in a few States it has been decided, either by statute or by judicial decision, that the common law of crimes is not a part of the criminal law of those States, but that their criminal law is to be taken only from statutes in which the entire system is supposed to be embodied.<sup>6</sup> Even in these States, however, as well as in others, the principles of the common law are resorted to in the construction of statutory provisions.<sup>7</sup>

As we have seen,<sup>8</sup> there is no common law of the United States as distinguished from the individual States. The federal courts have no common-law jurisdiction in criminal cases. Therefore no act can be punished as a crime against the United States, unless an act of congress has declared it a crime and prescribed the punishment and the court which shall have jurisdiction of the offense.<sup>9</sup>

§ 87. **Classification of Crimes.** Crimes are classified, according to their enormity in the eye of the law, into (1) treason, (2) felonies, and (3) misdemeanors.

3. Smith Elem. L. 133. See 12 Cyc. 130.

"An offense which is pursued at the discretion of the injured party or his representative is a civil injury. An offense which is pursued by the sovereign, or by the subordinate of the sovereign, is a crime." Austin Jur. § 17.

4. See 12 Cyc. 139.

A statute punishing an act committed before its enactment is called an *ex post facto* law, and in this country is prohibited by the constitution of the United States. See *supra*, §§ 40, 53; 8 Cyc. 1027.

On the other hand, if the law in force when an act was committed, and under which it might have been punished, is repealed without a saving

clause before it is sought to punish therefor, no punishment can be imposed. See 12 Cyc. 139, 144.

5. As to the common law generally see *supra*, §§ 30, 31, 34. As to statutes see *supra*, §§ 38, 41, 44, 46 *et seq.* And see 12 Cyc. 140 *et seq.*

6. See 8 Cyc. 383, 384; 12 Cyc. 140. Crimes are defined and punished only by statute in Indiana, Iowa, Louisiana, New York (Pen. Code, § 2), Ohio, and Texas.

As to the creation and definition of crimes by statute see 12 Cyc. 141 *et seq.*

7. See Smith Elem. L. 134; 8 Cyc. 384, 385; 12 Cyc. 141.

8. See *supra*, § 34.

9. See 8 Cyc. 385, 386.

At common law high treason consisted in compassing or imagining the death of the sovereign, levying war against him, adhering to his enemies, giving them aid and comfort, and certain other acts against the sovereign; and petit<sup>10</sup> treason consisted in the murder of a superior by an inferior, as of a husband by his wife, a master by his servant, or a lord or ordinary by an ecclesiastic.<sup>11</sup> In this country what was petit treason at common law is merely homicide—murder, manslaughter, etc., according to the circumstances. Treason against the United States is defined in the federal constitution as consisting “only in levying war against them, or in adhering to their enemies, giving them aid and comfort.”<sup>12</sup> The same definition is regarded as marking the limits of the crime of treason against the individual States. Treason forms a class of its own, because from the legal point of view it is the greatest of all crimes. It is regarded as such a fundamental attack upon the order of society that no other crime is entitled to be classed with it. It is an attempt to undermine the very existence of the state; and although the law looks upon all crimes as serious offenses, in the punishment of which the state has a positive interest, it regards the existence of the state itself as the one condition upon which all law and order depend, and any attack upon it as a crime of such enormity that all others pale before it.

Under the term “felony” were included, at common law, all crimes, exclusive of treason, which under the old English law were punishable by death and forfeiture of lands or goods.<sup>13</sup> These were murder, manslaughter, rape, sodomy, arson, larceny, robbery, and burglary. They will be defined in a subsequent section.<sup>14</sup> Forfeiture for felony has been abolished both in England and in the United States, and only murder and, in some States, rape are now punishable by death;<sup>15</sup> but in most States all crimes which were felonies at common law are still felonies, and other crimes have been made felonies by statute. In many of the States by statute all crimes which are punishable by confinement in the state prison are felonies.<sup>16</sup>

Misdemeanors include all crimes less than felonies. Among others may be mentioned forgery, cheating, libel, assault and battery, affray, bigamy, bribery, conspiracy, counterfeiting, perjury, etc.<sup>17</sup>

As we have seen above, the term “felony” at the common law covered only a limited number of crimes; but in the States of

10. Pronounced “petty.”

11. 4 Blackstone Comm. 75, 76; 12 Cyc. 131.

12. U. S. Const. art. 3, § 3.

13. 4 Blackstone Comm. 94.

14. See *infra*, § 88, b.

15. In some States capital punishment has been entirely abolished.

16. See 12 Cyc. 131, 132.

17. See *infra*, § 88, c.



this country many crimes which were not felonies at common law are made so by statute, being either expressly declared to be so, or such a penalty being attached to them as to bring them within the meaning of the term. To distinguish these new felonies from those which existed under the common law, they are called "statute felonies."

§ 88. **Particular Crimes — a. In General.** It is not within the scope of this work to treat of or even to define all the crimes. The student will get all of this in the course on "Criminal Law." It is sufficient here to refer very shortly to the more important crimes.

Treason has already been defined.<sup>18</sup> We have also seen that the common-law felonies were (1) murder, (2) manslaughter, (3) rape, (4) sodomy, (5) arson, (6) larceny, (7) robbery, and (8) burglary. We may now define and shortly consider these. After that reference will be made to certain other well-known offenses which were misdemeanors at common law, but many of which have been made felonies by statute.

**b. The Common-Law Felonies. Murder.**—Murder at common law is the unlawful killing of any human being<sup>19</sup> with malice aforethought.<sup>20</sup>

The term "homicide" applies to any killing of a human being. It may be (1) murder, as just defined, or (2) manslaughter, as defined below; both of which are felonious homicides. Or it may be (3) justifiable, in which case there is no crime, as where the proper officer legally executes a criminal condemned to death, where a person, not being in fault himself, kills another in necessary defense of life or limb, or where one necessarily kills another to prevent rape, robbery, or some other felony attempted by force or surprise, and in certain other cases.<sup>21</sup> Or it may be (4) excusable, and not now punishable, as where it is the result of accident in the performance of a lawful act without criminal negligence, or where one kills another in necessary self-defense in a sudden affray or encounter.<sup>22</sup> If a homicide is not justifiable or excusable, it is either murder or manslaughter.

The distinguishing characteristic of murder is the "malice aforethought." This is a very technical expression and we cannot go at any length into its meaning now. It has been defined generally as "that condition of mind which shows a heart regard-

18. See *supra*, § 87.

19. A child in its mother's womb is not a human being within this definition, and therefore, to destroy it is not murder, but a mere misdemeanor, unless it is born alive and afterward dies from the injuries received. See 21 Cyc. 662.

20. 4 Blackstone Comm. 195; 21 Cyc. 703.

21. See 21 Cyc. 793 *et seq.*; and *infra*, § 89, j.

22. See 21 Cyc. 795, 800, 831; and *infra*, § 89, i, j.

less of social duty, and fatally bent on mischief." The necessary malice may be either express, as where one unlawfully kills another intentionally and without justification, excuse, or mitigation; or it may be implied from the circumstances of the killing, as where one kills another, even unintentionally, in an attempt to commit some other felony, like burglary or robbery, or in wantonly doing an act which is likely to cause death or great bodily harm.<sup>23</sup> In many States the common law in relation to murder has been very materially changed by statute. In some States murder has been divided into degrees according to the circumstances of the killing.<sup>24</sup>

*Manslaughter.*—Manslaughter is the unlawful killing of another without malice aforethought. It is either voluntary or involuntary, the former being where the killing is intentional and the latter where it is not.

Voluntary manslaughter is where one kills another intentionally, but in a sudden heat of passion caused by adequate provocation, and not with malice. If there is malice the killing is murder notwithstanding the provocation.<sup>25</sup> The provocations deemed sufficient to reduce a homicide to manslaughter are an assault and battery, mutual sudden combat, detecting one's wife in the act of adultery, illegal arrest or detention, etc.; but as a rule mere words or gestures, however offensive, insulting, or abusive, are not sufficient.<sup>26</sup>

Involuntary manslaughter is the killing of another without malice and unintentionally, but (1) in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty. An illustration under the first head is where a man assaults and beats another, not in a way manifestly tending to cause death or great bodily harm, and unintentionally kills him. An illustration under the second head is where one unintentionally kills another by careless driving or careless handling of firearms. And an illustration under the third head is where a railroad employee causes death by neglect of his duty to regard or give signals or set switches.<sup>27</sup>

*Rape.*—Rape is defined by Blackstone as "the carnal knowledge of a woman forcibly and against her will." This defini-

23. See 21 Cyc. 703 *et seq.*; Clark Cr. L. (2d ed.) 187.

24. This will be seen in the course on "Criminal Law."

25. See 21 Cyc. 739.

If between the provocation and the killing the slayer's blood had cooled, or if there was reasonable time for

it to cool, the homicide is imputed to malice and is murder. See 21 Cyc. 758.

26. See 21 Cyc. 741 *et seq.*; Clark Cr. L. (2d ed.) 197.

27. See 21 Cyc. 760 *et seq.*; Clark Cr. L. (2d ed.) 204.

tion, however, is defective, for the carnal knowledge must be unlawful,<sup>28</sup> there may be constructive as well as actual force,<sup>29</sup> and there may be no consent in law where there is consent in fact. Therefore rape is more accurately defined as the act of having unlawful carnal knowledge of a woman by actual or constructive force, and without her conscious consent, or with her consent in fact where the law deems her incapable of consenting— as in the following cases: (1) Where her resistance is overcome by actual force;<sup>30</sup> (2) where no actual force is used, but because of her condition, known to the man, she cannot consciously consent;<sup>31</sup> (3) where she is below the age at which the law deems her capable of consenting;<sup>32</sup> (4) where her consent is extorted by fear of immediate bodily harm; and (5) in a few States, where her consent is obtained by fraud.<sup>33</sup> In theory there must be, to constitute this crime, want of consent on the part of the woman, but, as the above summary shows, there may be no consent in the eye of the law, where there is consent in fact.<sup>34</sup>

*Sodomy.*—Sodomy, generally spoken of as “the abominable and detestable crime against nature,” is carnal copulation against the order of nature by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with a beast.<sup>35</sup>

*Arson.*—Arson at common law is the wilful and malicious burning of the dwelling-house or outhouse of another.<sup>36</sup> To constitute the crime: (1) There must be some burning of the house, although any burning, however slight, is sufficient.<sup>37</sup> (2) It must

28. Thus it is not rape for one to have carnal knowledge of his wife, although by force and against her will.

29. As was said in an English case, “the word ‘forcibly’ does not necessarily mean ‘violently,’ but with that description of force which must be exercised in order to accomplish the act.” *Reg. v. Dee*, L. R. 14 Ir. 476.

30. Where the woman is capable in fact and in law of consenting, she must “resist to the uttermost.” If she finally consents, although reluctantly, and although force may have been previously used, there is no rape, unless her consent is extorted by threats and fear of immediate bodily harm.

31. Thus it is rape to have carnal knowledge of a woman where, to the knowledge of the man, she is so insane, insensible, or drunk as to be incapable of consciously consenting.

32. At common law the age below which a girl was deemed incapable of consenting was ten years. In a few States in this country it has been held to be twelve years, and in other States by statute it has been raised higher, in some as high as eighteen years.

33. As to this the authorities are conflicting. See *Clark Cr. L.* (2d ed.) 220; “Rape,” — *Cyc.* —.

34. See “Rape,” — *Cyc.* —; *Clark Cr. L.* (2d ed.) 215.

35. 4 *Blackstone Comm.* 215; “Sodomy,” — *Cyc.* —; *Clark Cr. L.* (2d ed.) 365.

36. See 3 *Cyc.* 984 *et seq.*; 4 *Blackstone Comm.* 220; *Clark Cr. L.* (2d ed.) 255.

37. Mere charring, without any blaze, is enough; but it is not arson to set fire to and burn bedclothing or furniture in a house, if the wood of the house is only scorched or blackened by the smoke.

be of a dwelling-house or outhouse used in connection therewith.<sup>38</sup> (3) It is also necessary that the house shall be that of another, at least as occupant.<sup>39</sup> (4) And the burning must be caused wilfully and maliciously.<sup>40</sup>

*Burglary.*—Burglary at common law is the breaking and entering of the dwelling-house of another in the night-time, with the intent to commit a felony therein,<sup>41</sup> whether the felony is actually committed or not.<sup>42</sup> To constitute the crime: (1) There must be some breaking of the house, but the slightest actual breaking is sufficient;<sup>43</sup> and the breaking may be either actual or constructive.<sup>44</sup> (2) There must be some entry into the house, but the slightest entry is sufficient, and the entry may be by an instrument.<sup>45</sup> (3) The house broken and entered must be the dwelling-house of another; but an outhouse within the curtilage or common inclosure is regarded as a part of the dwelling-house.<sup>46</sup> (4) It is also necessary that both the breaking and the entry shall be in the night-time.<sup>47</sup> (5) And both the breaking and entry

38. The dwelling must be occupied, but it need not be at the time actually inhabited, provided it is usually inhabited and the occupant is only temporarily absent. And the building may be occupied in part for other purposes, as in the case of a store with sleeping apartments in the rear or above.

The burning of other buildings than dwellings, like shops, warehouses, etc., is in most States made arson by statute. See 3 Cyc. 986 *et seq.*

39. It is not arson at common law for a person to burn his own house unless it is occupied by another than himself. But the actual occupant is regarded as the owner for the purposes of this crime.

40. Thus to burn another's house by accident or negligence, not being wilful, is not arson; nor is it arson at common law to burn another's house at his request to defraud an insurance company, for the burning is not malicious.

41. See 6 Cyc. 172; 4 Blackstone Comm. 224; Clark Cr. L. (2d ed.) 261.

42. In other words, the offense consists in the breaking and entering with the felonious intent, and not in the commission of the intended felony after entry. See 6 Cyc. 197.

43. Thus it is not burglary to enter through an open door, window, or other aperture, or even to enter through a door or window which is partially, but not sufficiently, open;

but it is otherwise to enter by raising a closed window, by lifting the latch or other fastening of a window or door, or even by pushing open a closed door. See 6 Cyc. 174.

44. Thus there is a constructive breaking, so as to constitute burglary, where one enters through a chimney, or by fraud, as where he knocks at the door and, on its being opened, fraudulently enters with the necessary felonious intent. See 6 Cyc. 178.

45. For example, there is a sufficient entry where a head, a hand, an arm, or a foot is thrust within the house, or where a gun is thrust through a window which has been broken, or a hook inserted for the purpose of taking out goods. See 6 Cyc. 182, 183.

46. See 6 Cyc. 185.

It is not necessary, however, that the dwelling be at the time actually inhabited, provided the tenants are only temporarily absent. See 6 Cyc. 186.

In most States there are statutes making it burglary to break and enter with felonious intent buildings other than dwelling-houses, such as stores, warehouses, etc. See 6 Cyc. 189.

47. According to the common law night-time begins when daylight ends, or when the countenance ceases to be reasonably discernible, and ends at earliest dawn, or as soon as the countenance becomes discernible; and the fact that it is bright moonlight, or

must be with intent to commit some felony in the house, although the intended felony need not be actually committed.<sup>48</sup>

*Larceny.*—Larceny at common law is the taking and carrying away of the mere personal goods of another with intent to steal the goods,<sup>49</sup> or more specifically, the taking and carrying away or removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the felonious intent to deprive him of his property therein.<sup>50</sup> This is perhaps the most technical of all crimes, and the student cannot expect to understand it thoroughly at this stage of the course. He will be given merely a general idea of the offense here, leaving further consideration until the course on Criminal Law. It is sufficient for the present to say that to constitute the crime of larceny the following elements are essential: (1) The thing taken must be the personal property of another, and therefore (a) it must be a thing which the law regards as property;<sup>51</sup> (b) it must be personal, and not real property;<sup>52</sup> and (c) it must be generally or specially owned by another.<sup>53</sup> (2) The property must be taken from the actual or constructive possession of the owner by a trespass.<sup>54</sup> (3) It is also neces-

that the place around the house is brightly lighted by gas or electricity, is immaterial. See Clark Cr. L. (2d ed.) 267; 6 Cyc. 184.

By statute in most States breaking and entry in the daytime is now punished as burglary, although not so severely as when it is in the nighttime. See 6 Cyc. 184.

48. This specific intent to commit a felony, both at the time of the breaking and at the time of the entry, is essential to the crime. It is sufficient if the intent be to commit any of the common-law felonies above enumerated (*supra*, § 88), or any other felony created by statute. See 6 Cyc. 195; Clark Cr. L. (2d ed.) 268.

49. See 25 Cyc. 10.

50. Clark Cr. L. (2d ed.) 271.

51. Thus it is not larceny to kill and immediately carry away from another's land animals *feræ naturæ*, or wild animals, as the law does not regard them as property until they have been killed or reclaimed. See *supra*, § 72; and 25 Cyc. 17.

52. Thus it is not larceny at common law to sever and immediately carry away property which is so attached to land or buildings as to have the character of real property, like growing crops, ore, doors, pipes, and the like. See *supra*, § 71; and 25 Cyc. 15.

53. The property need not be taken from the general owner. Larceny may be committed by taking property from a bailee or even from one who has himself stolen it. Indeed, the general owner of property may commit the offense by taking it from a bailee or special owner. See 25 Cyc. 89.

54. A trespass in the taking and carrying away of the property is absolutely essential to larceny at common law. Therefore a person who is in lawful possession of another's property as bailee does not commit larceny by appropriating it to his own use so long as his lawful possession continues. In such case there is no trespass. The statutes against embezzlement were enacted to cure this defect in the common law. See 15 Cyc. 488; 25 Cyc. 22; Clark Cr. L. (2d ed.) 280, 281.

Again, a person who obtains another's property by false pretenses does not, as a rule, commit larceny if the other consents to part with the property, as distinguished from the mere possession, and there is no trick. Here also there is no trespass. The statutes against the obtaining of property by false pretenses were enacted to cure this defect in the common law. See 19 Cyc. 390; 25 Cyc. 38; Clark Cr. L. (2d ed.) 289.

sary that it be carried away from the place it occupies, but any removal, however slight, is sufficient.<sup>55</sup> (4) There must be the specific felonious intent to deprive the owner permanently of his property;<sup>56</sup> the technical term for such intent being "*animus furandi*"—intent to steal. This intent must exist at the time of the taking.<sup>57</sup> The taking must be without claim of right.<sup>58</sup> In a few jurisdictions the taking must be *lucri causa*, that is, for the gain or advantage of the thief; but in most jurisdictions this is not necessary, it being sufficient if the intent is to deprive the owner permanently of his property.<sup>59</sup> Larceny at common law is divided into grand larceny and petit<sup>60</sup> larceny, according to the value of the property stolen, but this distinction has been abolished in many jurisdictions.<sup>61</sup> Larceny, both at common law and by statute, is (1) simple, that is, where there are no aggravating circumstances; or (2) compound, that is, where there are such circumstances, as where the property is taken from the person of another not under such circumstances as to constitute robbery,<sup>62</sup> or where it is taken from a dwelling-house, etc.<sup>63</sup>

**Robbery.**—Robbery is an aggravated form of larceny, but is treated as a distinct crime. It is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by actual or threatened violence.<sup>64</sup> To constitute this crime: (1) The property must be such as to be the subject of larceny, as explained above. (2) It must be taken and carried away, as in the case of larceny. (3) It must be taken from another's person or in his actual presence.<sup>65</sup> (4) It must be so taken either by violence or by putting in fear. Thus

55. Thus merely to kill an animal without carrying it away is not larceny. Nor is it larceny to attempt to take property which cannot be removed because it is fastened by a chain. As stated above, however, the slightest carrying away is sufficient, as where property is lifted from a person's pocket or from a drawer, although before it is entirely removed, the thief is detected and drops it. See 25 Cyc. 18 *et seq.*

56. Thus it is not larceny to take property with intent to use it temporarily and then return it. See 25 Cyc. 47; Clark Cr. L. (2d ed.) 297.

57. Thus, as a rule it is not larceny if one obtains property by mistake or finding and afterward forms and carries out the felonious intent to appropriate it to his own use. See 25 Cyc. 43, 45.

58. One who takes property under a *bona fide* claim that he owns the same is not guilty of larceny, al-

though in fact it may belong to another. In such case the felonious intent is wanting. See 25 Cyc. 49.

59. See 25 Cyc. 52.

60. Pronounced "petty."

61. At common law grand larceny is the stealing of goods above the value of tweldepence; but in some States by statute the value is higher. See 25 Cyc. 60.

62. As to robbery see *infra*, this section.

63. See 25 Cyc. 12, 63.

64. See "Robbery," — Cyc. —; Clark Cr. L. (2d ed.) 323.

65. It is sufficient if the taking be in the owner's actual presence, so that the thing taken is virtually under the protection of his person, as where he is by intimidation compelled to open his desk or safe, or where he is compelled to stand still while the property is taken. Clark Cr. L. (2d ed.) 324.

picking one's pockets by stealth merely is not robbery, but larceny. Nor is it robbery to snatch a thing from a person where there is no struggle to retain it. (5) And it must be taken with intent to steal, the same felonious intent being necessary as in larceny, as above explained. It will be seen from this that robbery differs from larceny only in the fact that the taking is from the person of the owner or in his presence, and that it is accomplished by means of force or threats of force.

c. **Common-Law Misdemeanors.** The crimes above enumerated are the common-law felonies. All other offenses, except treason, were misdemeanors, but, as we have seen, many of these have by statutes in some States been raised to the grade of felony.<sup>66</sup> The following misdemeanors at common law, or under early English statutes, most of which are common law with us, may be mentioned and defined:

*Conspiracy.*— This is a misdemeanor at common law. It may be defined generally as a combination of two or more persons to do an unlawful act, whether that act be the final object of the combination, or only a means to the final end, and whether that act be a crime, or an act hurtful to the public, a class of persons, or an individual. The offense is usually divided into three heads: (1) Where the end to be attained is in itself a crime, whether a felony or a misdemeanor;<sup>67</sup> (2) where the object is lawful, but the means by which it is to be attained are unlawful; or (3) where the object is to do an injury to a third person, or a class, although, if the wrong were inflicted by a single individual, it would be a civil wrong, and not a crime.<sup>68</sup> The gist of the crime is the unlawful combination, and no overt act in furtherance of the combination is necessary at common law, although this has been changed in some cases by statute.<sup>69</sup>

*Mayhem.*— This common-law misdemeanor, also called maiming, is the malicious and violent hurt of any part of a man's body, whereby he is rendered less able, in fighting, either to defend himself or to annoy his adversary. By statute it is extended in many jurisdictions so as to cover injuries merely disfiguring.<sup>70</sup>

*Assault and Battery.*— An assault is an attempt or offer, with

66. See *supra*, § 87.

67. As, for example, where two or more persons conspire to commit a felony, as murder or larceny, or any misdemeanor.

68. Thus it has frequently been held a crime to conspire to defraud a person out of his property, where the fraud amounted neither to a cheat at common law nor to false pretenses under the statute. The same is true of a conspiracy to procure a fraudulent

and sham marriage, or a fraudulent divorce. See 8 Cyc. 620, 623; Clark Cr. L. (2d ed.) 142.

69. See 8 Cyc. 624, 625.

70. See 26 Cyc. 1595, 1596; *supra*, § 62, b; Clark Cr. L. (2d ed.) 213.

Mayhem was a felony under the ancient common law, but it is now generally regarded as a misdemeanor, unless made a felony by statute. See 26 Cyc. 1596.

force or violence, to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote at the time an intention to do it, coupled with a present ability, or according to some of the courts an apparent ability, to carry such intention into effect. And a battery, or, as it is sometimes called, an assault and battery, is any unlawful touching of the person of another by the aggressor himself or by a substance put in motion by him.<sup>71</sup> The force or violence attempted or offered must be physical, and no words of themselves can constitute an assault.<sup>72</sup> An assault, or assault and battery, is either (1) common, that is, where there are no aggravating circumstances, or (2) aggravated, that is, where there are aggravating circumstances, as in the case of assault with intent to kill or rape, or to inflict grievous bodily harm.<sup>73</sup>

*False Imprisonment.*—False imprisonment is any unlawful restraint of a person's liberty, and is a misdemeanor at common law.<sup>74</sup> The crime is committed whenever a person detains the body of another by force, without his consent, and without legal cause. Two things are necessary: (1) There must be an imprisonment; and (2) the imprisonment must be unlawful. Every confinement of a person is an imprisonment, whether it be in a jail, or in a private house, or merely by detaining him for a moment in the street.<sup>75</sup>

*Kidnapping.*—Under the old common law kidnapping was "the forcible abduction or stealing away of a man, woman or child from their own country and sending them into another;"<sup>76</sup> but with us sending the person into a foreign country is not necessary. The offense may be defined as a false imprisonment aggravated by conveying, or in some States the mere attempt to convey, the person imprisoned to another place. It is a misdemeanor at common law.<sup>77</sup>

*Abduction.*—Abduction may be defined as the taking of a female without her consent, or without the consent of her parents or guardian, for the purpose of rape, marriage, or prostitution. It was probably not a crime at common law, unless as kidnapping, except where there was a conspiracy, in which case the conspiracy

71. See 3 Cyc. 1020, 1021.

It is a battery to spit on another, to push him angrily out of the way, to put a dog on him which actually bites or even touches him, or to inflict injury by administering poisonous or injurious drugs. To shoot, strike, or spit at a person and miss him, or to set a dog on him which does not touch him, is an assault, but not a battery. An assault may not result in a battery, but every battery

necessarily includes an assault. If the force is not applied, there is an assault only; if it is applied, there is an assault and battery. Clark Cr. L. (2d ed.) 229.

72. See 3 Cyc. 1022.

73. See 3 Cyc. 1026.

74. See 19 Cyc. 319, 376.

75. Clark Cr. L. (2d ed.) 247.

76. 4 Blackstone Comm. 219.

77. See 24 Cyc. 796; Clark Cr. L. (2d ed.) 248.



was the crime; but it was made a crime by an English statute which is old enough to be common law with us and is specifically made a crime by statute in most of our States.<sup>78</sup>

*Cheating.*—A cheat at common law is the fraudulent obtaining of another's property by means of some false symbol or token, or by other illegal practices which affect or may affect the public, and against which common prudence cannot guard, as by the use of false weights or measures; provided, however, that the act does not amount to the felony, larceny. It is a misdemeanor at common law.<sup>79</sup> To obtain property by mere false representations or lies was not regarded as a crime at common law, but was a mere tort or wrong, against which common prudence could guard; but this is now a crime in most jurisdictions under the statutes punishing the obtaining of property by false pretenses.<sup>80</sup>

*Receiving Stolen Goods.*—The receiving of stolen goods is possibly a substantive misdemeanor at common law, although this is doubtful.<sup>81</sup> It is very generally made a crime by statute. To constitute the offense: (1) The property must have been stolen and it must retain its character as stolen property when it is received. (2) It must be taken into the possession, although not necessarily the manual possession, of the receiver, with the consent of the person from whom it is received.<sup>82</sup> (3) The receiver must know that the property was stolen. (4) And he must have the felonious intent, as in the case of larceny.<sup>83</sup>

*Malicious Mischief.*—Malicious mischief is a misdemeanor at common law, and, although there is some conflict and uncertainty in the authorities, it may be generally defined as any wilful, physical injury to property from ill-will or resentment toward the owner, or, as is held by some courts, from wantonness, and not with intent to steal, as in the case of larceny.<sup>84</sup> More generally,

78. See 1 Cyc. 141; Clark Cr. L. (2d ed.) 250.

79. See 19 Cyc. 386; Clark Cr. L. (2d ed.) 314.

80. See 19 Cyc. 390.

81. It seems probable that at common law one who received stolen goods knowing them to have been stolen was only guilty of a misprision or a compounding of a felony (as to which see *infra*, this section), and afterward, under an English statute, as accessory after the fact to the larceny (as to which see *infra*, § 92), although there is authority for saying that the reception of stolen goods was a substantive misdemeanor at common law. See "Receiving Stolen Goods," — Cyc. —; Clark Cr. L. (2d ed.) 327.

82. A person may commit larceny, and not the crime of receiving stolen goods, by taking goods from one who has stolen them, if they are taken without his consent.

83. See *supra*, § 88, b.

One who receives goods, although knowing them to have been stolen, is not guilty of receiving stolen goods, if his purpose is to return them to the owner, or merely to detect the thief. See "Receiving Stolen Goods," — Cyc. —; Clark Cr. L. (2d ed.) 310, 329.

84. See 25 Cyc. 1672; Clark Cr. L. (2d ed.) 330.

Thus it is a crime at common law to deface tombs and monuments, although they are real estate, to maliciously injure trees, to tear off and

the offense may be defined as including all malicious and physical injuries to the rights of another, which impair utility or materially diminish value.<sup>85</sup>

*Nuisance.*—A common or public nuisance, the creation or maintenance of which is a misdemeanor at common law, is a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency, or morals of the community at large; and it may result either from an act not warranted by law, or from neglect of a duty imposed by law. To constitute a public nuisance the condition of things must be such as to injuriously affect the community at large, and not merely one or even a few individuals.<sup>86</sup>

*Forgery and Uttering.*—At common law *forgery* is a misdemeanor, but it is very generally made a felony by statute. It consists, at common law, in the false making or material altering, with intent to defraud, of any writing, which, if genuine, might actually or apparently be of legal efficacy or the foundation of a legal liability; or, as it has been otherwise expressed, of any writing to the prejudice of another man's right.<sup>87</sup> To constitute this crime: (1) The making or alteration must be false.<sup>88</sup> (2) It must be with intent to defraud.<sup>89</sup> (3) The instrument, as made or altered, must be of actual or at least apparent legal efficacy to impose a liability, or, in case of alteration of an instrument, to change a liability.<sup>90</sup> (4) And the alteration must therefore be material. To *utter a forged instrument* is to offer it, directly or indirectly, by words or actions as good. This, if done with intent to defraud, and with knowledge of the falsity of the instrument, being an attempt to cheat, is a misdemeanor at common law.<sup>91</sup>

*Bigamy.*—Bigamy is a statutory, and not a common-law crime.

carry away fixtures attached to real property, or to kill an animal, provided, in all cases, there is the necessary malice.

85. See 25 Cyc. 1672.

86. See 29 Cyc. 1252, 1278; Clark Cr. L. (2d ed.) 345.

87. See 19 Cyc. 1370; Clark Cr. L. (2d ed.) 333.

88. Thus signing as agent of another without authority is not forgery, as this is a mere false assumption of authority, and not the false making of an instrument.

89. Fraudulent intent is essential to this crime. It is no forgery therefore for one to carelessly write another's name without any purpose, or to insert in a contract which has been signed a provision which he understands the other party to have

agreed to. See 19 Cyc. 1376; Clark Cr. L. (2d ed.) 341.

90. Thus it is not a forgery to make a writing which is invalid on its face, as in the case of a will not signed by the requisite number of witnesses, or to write the name of a witness on a paper not required to be witnessed, or to falsely make a bank-note which a statute declares void, since all persons are presumed to know the law. But an instrument which is valid on its face, and is rendered invalid only because of extrinsic facts, may be the subject of forgery, as people are not presumed to know the facts. See 19 Cyc. 1379; Clark Cr. L. (2d ed.) 339.

91. See 19 Cyc. 1388; Clark Cr. L. (2d ed.) 343.

It is committed where one, being legally married, marries another person during the life of his or her wife or husband.<sup>92</sup>

*Adultery.*— This was not a common-law crime in England, but was regarded as a crime against the ecclesiastical law only, and was therefore punished exclusively in the ecclesiastical courts. With us a few courts have recognized this portion of the ecclesiastical law as part of our common law, and have regarded adultery as a common-law crime. Most courts, however, have taken the contrary view, and hold that, if it is not made a crime by statute, it cannot be punished at all as a distinctive crime, unless it amounts to open and notorious illicit cohabitation.<sup>93</sup>

*Lewdness.*— For man and woman to illicitly cohabit together, openly and notoriously, or for a person to be guilty of any open and notorious lewdness and indecency, is a crime at common law, as it constitutes a public scandal and nuisance.<sup>94</sup>

*Incest.*— This was not a crime at common law, but was punishable in the ecclesiastical courts only. It is, however, very generally declared a crime by statute. It may be defined broadly as illicit sexual intercourse between persons who are related within the degrees of consanguinity or affinity wherein marriage is prohibited by law.<sup>95</sup>

*Miscegenation.*— Miscegenation, or intermarriage between persons of different races, and more particularly between the white and negro races, or the living together of such persons in adultery or fornication, while it is not a crime at common law, is a statutory crime in some of the States.<sup>96</sup>

*Seduction.*— This is probably not a crime at common law, but it is made so by statute in most of the States. It may be defined generally as the act of a man in enticing a woman of previous chaste character, by means of persuasion and promises, or more particularly promise of marriage, to have sexual intercourse with him.<sup>97</sup>

92. See 5 Cyc. 688; Clark Cr. L. (2d ed.) 353.

In England, prior to the statute of James I, enacted in 1604, bigamy was punished in the ecclesiastical courts only. By that statute it was made a crime punishable in the civil courts. With us all the States have statutes defining and punishing this crime.

The statutes generally except from their operation (1) a person whose husband or wife has been absent for a certain number of years (usually seven) without being known by such person to be living within that time

(see *supra*, § 60 note 3); and (2) a person whose marriage has been declared void, null, or dissolved by the judgment of a court of competent jurisdiction.

93. See 1 Cyc. 952; Clark Cr. L. (2d ed.) 356, 358.

94. See 25 Cyc. 210; Clark Cr. L. (2d ed.) 362.

95. See 22 Cyc. 43.

96. See 27 Cyc. 798; and *infra*, § 152.

97. See "Seduction," — Cyc. —; Clark Cr. L. (2d ed.) 368.

*Abortion.*—To procure an abortion is to cause or procure the miscarriage or premature delivery of a woman. To do this, although with the mother's consent, after the child has quickened, is a misdemeanor at common law, but it is doubtful whether it is a crime before the child has quickened. There are statutes in most of the States, however, making it a felony to procure an abortion, whether the child has quickened or not.<sup>98</sup>

*Barratry, Maintenance, and Champerty.*—These three offenses have some features in common, and are all old common-law misdemeanors, because encouragement of strife and litigation is injurious to the public interests.<sup>99</sup> *Common barratry* is the offense of frequently exciting and stirring up quarrels and suits, either at common law or otherwise.<sup>1</sup> *Maintenance* is the officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it.<sup>2</sup> *Champerty* is a bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense.<sup>3</sup> These are not at the present time regarded as crimes to the same extent as under the old common law.<sup>4</sup>

*Obstructing Justice.*—It is a misdemeanor at common law to obstruct private or public justice, as by resisting or restraining a public officer in the exercise of his duty, or preventing the attendance of witnesses, or tampering with witnesses, etc.<sup>5</sup>

*Embracery.*—Embracery is an attempt to influence a jury corruptly to one side, by promises, persuasions, entreaties, money, entertainments, and the like, and is a common law misdemeanor.<sup>6</sup>

*Escape, Prison Breach, and Rescue.*—These common-law misdemeanors are in a sense related. The crime of *escape* is committed (1) by an officer or other person who, having lawful custody of a prisoner, voluntarily or negligently allows him to depart from such custody otherwise than in due process of law; or (2) by a prisoner, who voluntarily departs from lawful custody without breach of prison.<sup>7</sup> *Prison breach* is a breaking and going out of his place of confinement, by one who is lawfully imprisoned.<sup>8</sup>

98. See 1 Cyc. 170; Clark Cr. L. (2d ed.) 373.

99. Clark Cr. L. (2d ed.) 376, 377.

1. See 5 Cyc. 617.

2. See 6 Cyc. 851.

3. See 6 Cyc. 850.

4. For instance, in many States a lawyer may now take a case on a contingent fee, and also pay costs and expenses. See 6 Cyc. 854, 858.

5. See 29 Cyc. 1326; Clark Cr. L. (2d ed.) 379.

6. See 15 Cyc. 539; Clark Cr. L. (2d ed.) 380.

7. See 16 Cyc. 538; Clark Cr. L. (2d ed.) 381.

8. Under the old common law any prison breach was a felony, but this was changed by a statute which is part of our common law (1 Edw. II, St. 2), and now it is a felony only where the imprisonment is for a felony, and a misdemeanor in other cases.

*Rescue* is the forcible delivery of a prisoner from lawful custody by one who knows that he is in custody.<sup>9</sup>

*Misprision of Felony.*— Misprision of felony is a criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, and is a misdemeanor at common law.<sup>10</sup>

*Compounding Crime.*— The offense of compounding a crime is committed where one who knows that it has been committed agrees not to prosecute it. Compounding a felony, or forbearing to prosecute a felon on account of some reward received, is a misdemeanor at common law.<sup>11</sup> To compound a misdemeanor is indictable at common law only where the misdemeanor is of a public rather than a private character.<sup>12</sup>

*Perjury and Subornation.*— Perjury at common law is the wilful and corrupt giving, upon a lawful oath, or in any form allowed by law to be substituted for an oath, as in the case of an affirmation, in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry. It is a misdemeanor at common law, but has very generally been made a felony by statute.<sup>13</sup> *Subornation of perjury* is the procuring of another to commit perjury, and is a misdemeanor at common law. To constitute this offense the perjury must be actually committed.<sup>14</sup>

*Bribery.*— Bribery at common law is defined by Blackstone to be where a public or other officer connected with the administration of justice receives any undue reward to influence his behavior or action in office;<sup>15</sup> but by the weight of authority, even at common law, this offense is committed by the giving or receiving of a reward to influence any official act, whether of a judicial officer or of some other public officer.<sup>16</sup>

*Misconduct in Office.*— This is a misdemeanor at common law. It may consist in malfeasance or nonfeasance. It is *malfeasance* and a misdemeanor at common law for any public officer, in the exercise of, or under the color of exercising, the duties of his office, to do any illegal act, or abuse any discretionary power with which he is invested by law, from an improper motive; and such malfeasance may be— (1) *extortion*, which is the taking under color of office, from any person, any money or valuable

9. Rescue is a felony or misdemeanor, according to the crime with which the prisoner is charged.

10. See Clark Cr. L. (2d ed.) 383.

11. See 8 Cyc. 492.

12. This therefore does not prevent settlements for assaults and private cheats; but to agree not to

prosecute for a riot is a crime. See 8 Cyc. 494; Clark Cr. L. 383, 384.

13. See 30 Cyc. 1399; Clark Cr. L. (2d ed.) 385.

14. See 30 Cyc. 1423.

15. 4 Blackstone Comm. 139.

16. See 5 Cyc. 1039; Clark Cr. L. (2d ed.) 389.

thing which is not due from him at the time when it is taken;<sup>17</sup> (2) *oppression*, which consists in inflicting upon any person any bodily harm, imprisonment, or other injury not amounting to extortion;<sup>18</sup> or (3) *fraud or breach of trust*, it being a misdemeanor for any officer, in the discharge of the duties of his office, to commit any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person.<sup>19</sup> It is *nonfeasance* and a misdemeanor for any public officer to wilfully neglect to perform any duty which he is bound to perform either by common law or by statute, provided the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter.<sup>20</sup>

*Breach of the Peace.*—Any wilful and unjustifiable disturbance of the public peace, if it is of sufficient magnitude for the law's notice, and does not amount to a felony, is a misdemeanor at common law.<sup>21</sup>

*Dueling.*—It is a misdemeanor at common law to challenge another to fight a duel, or to be the bearer of such a challenge, or to provoke another to send a challenge.<sup>22</sup> To kill one in a duel is murder.<sup>23</sup>

*Unlawful Assembly, Rout, and Riot.*—These offenses are related, and are misdemeanors at common law. An *unlawful assembly* is an assembly of three or more persons (1) with intent to commit a crime by open force, or (2) with intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons reasonable grounds to apprehend a breach of the peace. A *rout* is an unlawful assembly which has made a motion toward the execution of the common purpose of the persons assembled. And a *riot* is (1) where an unlawful assembly has actually begun to execute the purpose for which it is assembled, by a breach of the peace, and to the terror of the public; or (2) where a lawful assembly has formed and proceeded to execute an unlawful purpose to the terror of the people, although they had not that purpose when they assembled. To constitute these crimes at common law three persons are essential.<sup>24</sup>

17. See 19 Cyc. 35; Clark Cr. L. (2d ed.) 391.

18. See Clark Cr. L. (2d ed.) 391.

19. See Clark Cr. L. (2d ed.) 391.

20. See Stephen Dig. Cr. L. arts. 119-122; Clark Cr. L. 391; 24 Cyc. 432; 29 Cyc. 1449.

21. See 5 Cyc. 1024; Clark Cr. L. (2d ed.) 394.

22. See 14 Cyc. 1111.

23. See *supra*, § 88, b; 21 Cyc. 708.

24. See Clark Cr. L. 395; "Riot," — Cyc. —; "Unlawful Assembly," — Cyc. —.

If three or more persons meet together for the purpose of beating another who lives a mile off, there is an unlawful assembly. While they are on the road to carry out the purpose, there is a rout. When they make the attack and beat him, there is a riot.

*Affray.*—An affray is the fighting of two or more persons in a public place to the terror of the people, and is a misdemeanor at common law.<sup>25</sup>

*Forcible Entry and Detainer.*—Forcible entry is where a person violently enters upon real property occupied by another, with menaces, force, and arms, without authority of law; and forcible detainer is detention of possession of the property by the same kind of force, and may be either where the original entry was forcible, or where it was peaceable. Forcible entry and forcible detainer were crimes under the old common law and were also defined and declared by early English statutes which are common law with us.<sup>26</sup>

*Libel.*—The books differ in defining libel. It may, however, be defined generally as the malicious publication of any writing, sign, picture, effigy, or other representation tending to expose any person to hatred, contempt, or ridicule. The word "libel" is used to denote both the defamatory matter published and the offense of publishing it. Libel is a misdemeanor at common law. The crime is regarded as one affecting the public peace. The law punishes publication of defamatory matter concerning another, not because of the injury to the reputation, but because it is calculated to provoke a breach of the peace, and therefore in a prosecution for criminal libel the truth of the publication is not a defense unless made so by statute.<sup>27</sup>

§ 89. Criminal Intent—*a. In General.* All common-law crimes and most statutory crimes consist of two elements—the criminal act or omission,<sup>28</sup> and the mental element, commonly called "criminal intent." It is a principle of the criminal law that ordinarily a crime is not committed if the mind of a person doing the act in question is innocent. The Latin maxim is: "*Actus non facit reum, nisi mens sit rea.*"<sup>29</sup> Hence it is said that every crime consists of two elements—the criminal act or omission, and the mental element, commonly called "criminal intent."<sup>30</sup> The necessity for a guilty mind or criminal intent does not mean that it is necessary that the person doing the prohibited act be

25. See 1 Cyc. 41; Clark Cr. L. (2d ed.) 398.

An affray differs from a riot in that there must be premeditation and at least three persons to constitute the latter. To constitute an affray the fighting must be in a public place. If it is in private there is an assault and battery only.

26. See 19 Cyc. 1112; Clark Cr. L. (2d ed.) 399. The word "arms" is here used, not in its popular sense, but technically, as meaning by force or violence.

27. See 25 Cyc. 243, 573; Clark Cr. L. (2d ed.) 400.

28. The various criminal acts and omissions have already been considered in the preceding section. Attempts will be hereafter considered.

29. Meaning "the act itself does not make a man guilty unless his intention is so."

30. See 12 Cyc. 147; Clark Cr. L. (2d ed.) 147.

conscious that it is wrong, for, as we shall see, ignorance of the law is no excuse.<sup>31</sup> It is true, indeed, that most, if not all, acts which are criminal at common law are *mala in se*, that is, wrong in themselves, and hence that to a greater or less extent the voluntary commission of the act presupposes a guilty mind. Yet in the case of some of the minor common-law offenses it can hardly be said that the commission of the act presupposes any such state of mind, except in a purely technical sense; and, if the act is prohibited, the bare intention to commit it is enough to supply the requisite mental element.

Again, it is true that at common law ignorance or mistake of fact as a rule exempts from criminal liability if the act done would have been lawful had the facts been as the actor believed; the element of a guilty mind being in such case absent. Yet by statute many acts wrong only because prohibited, called, therefore, *mala prohibita*, are made criminal, to which the rule does not apply, it being competent for the legislature to define a crime in such a way as to make the existence of a guilty mind immaterial.<sup>32</sup>

"Malice," although the word is also used in a restricted sense in the definition of particular crimes, such as murder,<sup>33</sup> and malicious mischief,<sup>34</sup> is often used synonymously with "criminal intent." Both terms, by reason of the broader meaning given to them in ordinary language, are somewhat misleading. The voluntary doing of an unlawful act is ordinarily sufficient ground on which to raise the presumption of intent, both as to that act and as to any criminal act which is the natural result; and if a man, while acting with a view to one crime, commits another criminal act, which he did not intend, he may frequently be punished for the latter act as a crime.

Again, the mental elements of different crimes differ widely; and since a man may be criminally liable for mere negligence, it is even possible for absence of mind to constitute, or to supply the place of, criminal intent. Indeed, having in view the diverse states of mind which in different crimes are sufficient to constitute the mental element, it is hardly possible to define criminal intent more narrowly than by saying that it is the particular state of mind, differing in different crimes, which, by the definition of the particular crime, must concur with the criminal act.<sup>35</sup>

31. See *infra*, § 89, g.

32. See *infra*, § 89, h.

33. See *supra*, § 88, b.

34. See *supra*, § 88, c.

35. Clark Cr. L. (2d ed.) 46-48. Thus criminal intent, or *mens rea*, means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the

case of rape, an intention to have forcible connection with a woman without her consent; and in case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. See *supra*, § 88.



"The full definition of every crime contains, expressly or by implication, a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed."<sup>36</sup>

**b. Motive.** Motive is that which incites or stimulates a person to do an act. It is not an essential element of crime. A bad motive will not make an act a crime, nor will a good motive prevent an act from being a crime. Motive may, however, tend to show that an act was wilful, and done with a criminal intent.<sup>37</sup>

**c. General Intent—Intent Presumed from Act.** Where an act is prohibited on pain of punishment, intention on the part of one capable of entertaining intent, and acting without justification or excuse, to do the act, constitutes criminal intent. In such case the existence of the intent is presumed from commission of the act, on the ground that a person is presumed to intend his voluntary acts and their natural and probable consequences.<sup>38</sup>

**d. Specific Intent.** On the other hand, many crimes consist not merely in doing a prohibited act, but in doing an act with a particular state of mind, or specific intent. When, by the common law or by statute, a specific intent is essential to a crime, the specific intent must exist, and must be proved; and consequently is not to be presumed from the mere commission of the act with which it must concur to constitute the crime.<sup>39</sup> Thus burglary is defined as breaking and entering a dwelling-house of another in the night-time with intent to commit a felony therein, and consequently, if the proof fails to establish the intent to commit a felony, but simply shows an intent to commit a lawful act or a mere misdemeanor, the crime is not established.<sup>40</sup> Again, to constitute the crime of malicious mischief, the mere wilful infliction of injury is not always enough, but that peculiar state of mind which constitutes "malice" must be shown.<sup>41</sup> Other illustrations may readily be found by examining the definitions of particular crimes given in a preceding section.<sup>42</sup>

**e. Constructive Intent.** Where a person commits a criminal act while actually intending a different criminal act, which is *malum in se*, or wrong in itself, the concurrence of the actual criminal intent with the act committed constitutes that act a crime. The intent in such a case is called "constructive intent."<sup>43</sup> This doc-

36. Per Stephen, J., in *Reg. v. Tolson*, 23 Q. B. D. 168.

37. See 12 Cyc. 149; Clark Cr. L. (2d ed.) 49.

38. See 12 Cyc. 152, 153; Clark Cr. L. (2d ed.) 50.

39. See 12 Cyc. 152; Clark Cr. L. (2d ed.) 51.

40. See *supra*, § 88, b, "Burglary."

41. See *supra*, § 88, c, "Malicious Mischief."

42. See *supra*, § 88, b, c.

43. An illustration is where a man unintentionally kills one person in attempting to kill another with malice aforethought. He is guilty of mur-

trine of constructive intent does not apply, however, where a specific intent is necessary to constitute a particular crime. Constructive intent will not supply specific intent.<sup>44</sup>

**f. Intent in Cases of Negligence.** In certain crimes the criminal act or omission consists in mere neglect to observe proper caution in the performance of an otherwise lawful act or in culpable failure to perform a duty imposed by law or by contract, whereby injury results to the public or to an individual. In such cases the criminal intent consists simply in the state of mind which necessarily accompanies such negligent act or culpable omission. In other words, as it is frequently put, in some cases criminal intent may be supplied by negligence.<sup>45</sup>

**g. Ignorance or Mistake of Law.** It is the settled rule that everyone is conclusively presumed to know the law, and that ignorance on the part of the wrong-doer of the law which makes an act criminal is no excuse. This rule was applied even in the extreme case of violation of a statute by a person who was at sea when it was enacted, and when he violated it, and who could not have known of it. Even foreigners coming into a country and ignorantly violating its laws are liable, although the act may not be a crime in their own country.<sup>46</sup> The rule does not apply, however, where a specific intent is essential to a crime and ignorance of the law negatives such intent.<sup>47</sup>

**h. Ignorance or Mistake of Fact.** At common law ignorance or mistake of fact will, as a rule, exempt one from criminal liability, because of want of criminal intent, if the act done would have been lawful if the facts had been as he believed, provided the ignorance or mistake was not voluntary or due to negligence.<sup>48</sup> But this rule does not necessarily apply where the intention is unlawful, for in such case the doctrine of constructive intent may apply;<sup>49</sup> or where the ignorance or mistake is voluntary or the result of negligence, for, as we have seen, negligence may supply the necessary criminal intent.<sup>50</sup> Nor does the rule apply where a crime is so defined by statute that some particular independent fact must coexist, and it appears that it was the intention of the

der. And it is murder at common law to kill a person unintentionally in committing arson or robbery.

44. See *supra*, § 89, d.

45. The question of criminal negligence most frequently arises in connection with manslaughter, although it also arises in connection with nuisance, escape, and some other common-law crimes, as well as many statutory crimes. See *supra*, § 88, b, c.

46. See 12 Cyc. 155; Clark Cr. L. (2d ed.) 80.

47. For example, the specific intent to steal is necessary to larceny, and one cannot commit this crime by taking another's property, where, although by mistake of law, he believes it to be his own. See 12 Cyc. 156; and *supra*, § 88, b, "Larceny."

48. See 12 Cyc. 156; Clark Cr. L. (2d ed.) 82.

49. See *supra*, § 89, e; 12 Cyc. 157.

50. See *supra*, § 89, f; 12 Cyc. 157.

legislature that one doing the forbidden act should do it at his peril. In such a case ignorance of the existence of such fact is no excuse.<sup>51</sup>

i. **Accident or Misfortune.** A person is not criminally liable for an accident happening in the performance of a lawful act with due care.<sup>52</sup>

j. **Justification or Excuse.** Although an act ordinarily criminal may be intentionally committed, it may not be a crime because by reason of particular circumstances the law deems it justifiable or excusable. Acts which would otherwise be criminal may be justifiable or excusable if done (1) under public authority; (2) under parental authority; (3) in prevention of crime; (4) in suppressing a riot; (5) in defense of person or property; (6) in making an arrest or preventing an escape; or (7) under duress, coercion, or necessity.<sup>53</sup> Questions of justification or excuse usually arise in connection with the right to inflict personal injury or to cause death,<sup>54</sup> and they will be fully considered in dealing with particular crimes in the course on Criminal Law. It is only necessary here to state the law as to duress, coercion, and necessity.

**Duress.**—When any crime, except murder, is committed, aided, or participated in by two or more persons, and is committed, aided, or participated in by one of them only because during the time of the commission he is compelled to do so by threats by one or more of the others, and reasonable apprehension of instant death or great bodily harm in case he refuses, the threats and apprehension constitute duress, and excuse him. Fear of injury to property, or, it seems, of anything short of death or great bodily harm, will not excuse. It also seems that duress is no excuse for taking life. And it is no excuse for the commission of the crime that it was done under the command of another, at least except in the case of a married woman acting under the command of her husband, as will now be explained.<sup>55</sup>

**Married Women.**—If a married woman, in the presence of her husband, commits an act which would be a crime under other circumstances, she is generally presumed to have acted under her husband's coercion, and such coercion excuses her act. This presumption, however, may be rebutted by circumstances showing that in fact she was not coerced; and the rule does not apply in

51. Illustrations of this exception are found in the case of various police regulations, as in the case of statutes punishing the sale of adulterated food products, it being sometimes held that ignorance of the adulteration is no defense. See 12 Cyc. 158.

52. If the accident happens in the performance of an unlawful act, the

doctrine of constructive intent may apply (*supra*, § 89, e); and if there is want of due care, the negligence may supply the necessary criminal intent (*supra*, § 89, f).

53. Clark Cr. L. (2d ed.) 90.

54. See 21 Cyc. 795 *et seq.*

55. See 12 Cyc. 161; Clark Cr. L. (2d ed.) 91, 92.

the case of treason, murder, probably robbery, or those crimes, like keeping a bawdy-house, which from their nature are generally committed by women.<sup>56</sup>

*Necessity.*—Physical necessity or impossibility is an excuse for failure to perform a duty imposed by law. How far an act which would otherwise be a crime may be excused if done by one, not in defense, but to avoid otherwise inevitable consequences, which would inflict upon him or others whom he is bound to protect, irreparable evil, is doubtful. It seems, however, that no man can, on the plea of necessity, excuse himself for taking the life of an innocent person.<sup>57</sup>

**k. Provocation.** Provocation is no ground for exempting one absolutely from criminal responsibility for his acts, but it may be ground for mitigating the punishment, as in the case of manslaughter in the heat of passion caused by adequate provocation.<sup>58</sup>

§ 90. Criminal Incapacity — **a. In General.** Since every crime usually consists of two elements — the act, and the mental element, commonly called “criminal intent”<sup>59</sup>—no person can be guilty of crime, unless he has sufficient mental capacity to entertain the necessary criminal intent. Mental incapacity may exist in (1) infants, (2) insane persons, (3) drunken persons, and (4) corporations.

**b. Infants.** At common law a child under the age of seven years is conclusively presumed incapable of entertaining criminal intent, and cannot commit a crime. Between the ages of seven and fourteen a child is presumed to be incapable, but the presumption may be rebutted by showing capacity in fact.<sup>60</sup> After the age of fourteen, he is presumed to have sufficient capacity, and he must affirmatively show the contrary to escape liability. In a few States, by statute, the above ages have been raised or lowered.<sup>61</sup>

**c. Insane Persons.** Insanity, as understood in the Criminal Law, is any defect or disease of the mind which renders a person incapable of entertaining a criminal intent. Since a criminal intent is an essential element of crime, no person who is so insane that he cannot entertain it is criminally responsible for his acts; but the courts do not entirely agree as to the proper test of insanity. Defect or disease of the mind may have one or the other of the following effects: (1) It may render a person in-

56. See 21 Cyc. 1353; Clark Cr. L. (2d ed.) 93.

57. See 21 Cyc. 632; Clark Cr. L. (2d ed.) 95.

58. Clark Cr. L. (2d ed.) 97. See *supra*, § 88, b, “Manslaughter.”

59. See *supra*, § 89, a.

60. In England a boy of ten years, who after killing a little girl, hid her

body, was held criminally liable, because the circumstances showed a mischievous discretion; and a boy of eight years was hanged for arson. In this country a boy of twelve years was hanged for murder in New Jersey.

61. See 22 Cyc. 622; Clark Cr. L. (2d ed.) 58.

capable of distinguishing between right and wrong, and in such case no criminal liability attaches.<sup>62</sup> (2) It may render a person partially insane, or subject to insane delusions as to existing facts, but not in other respects insane. In such case he will be in the same situation as to criminal responsibility as if the facts in respect to which the insane delusion exists were real.<sup>63</sup> (3) It may deprive him of freedom of will, as in the case of irresistible impulse, when he nevertheless knows that his act is wrong. In such case some courts hold that he is not responsible, while others hold that he is.<sup>64</sup> Moral and emotional insanity, as distinguished from mental, does not exempt one from responsibility.<sup>65</sup> A person cannot be tried for crime if he is insane, although he was sane when he committed the act, as he is deemed incapable of conducting his defense; nor can an insane person be sentenced and punished, even after conviction.<sup>66</sup>

**d. Drunken Persons.** As a general rule, when a person voluntarily drinks and becomes intoxicated, and while in such condition commits an act which would be a crime if he were sober, he is nevertheless responsible, even though he is incapable of knowing what he is doing, the settled rule being that voluntary drunkenness is no excuse. This rule, however, does not apply: (1) Where the act is committed while laboring under delirium tremens, or settled insanity, resulting from voluntary drunkenness; or (2) where a specific intent is essential to constitute the crime charged, as in the case of burglary or larceny, and the fact of intoxication negatives its existence; and (3) in prosecutions for murder the fact of intoxication may be material on the question of provocation, reducing the crime to manslaughter.<sup>67</sup> Of course, there is no criminal responsibility for acts committed while in a state of involuntary drunkenness, destroying the reason and will.<sup>68</sup>

**e. Corporations.** A corporation, public or private, may be criminally liable for omission to perform a duty imposed upon it by law;<sup>69</sup> and also for certain acts of misfeasance, such as maintaining a public nuisance; but in the nature of things, as it is impersonal, it cannot be guilty of felony or perjury, or, it seems,

62. All the courts agree as to this. See 12 Cyc. 165, 166; 21 Cyc. 663.

63. For example, if a person, under an insane delusion, supposes another to be in the act of attempting to take his life, and he kills the other, as he supposes, in self-defense, he is not responsible; but it would be otherwise if his delusion were that the deceased had libeled or defrauded him, since such fact, if true, would be no defense. See 12 Cyc. 167; 21 Cyc. 666.

64. See 12 Cyc. 169; 21 Cyc. 663-665; Clark Cr. L. (2d ed.) 65.

65. See 12 Cyc. 170; 21 Cyc. 666.

66. See 22 Cyc. 1213.

67. See 12 Cyc. 170 *et seq.*; 21 Cyc. 668 *et seq.*; Clark Cr. L. (2d ed.) 70.

68. As where one becomes drunk involuntarily through the stratagem or fraud of another, or negligence of his physician. The drinking itself must be involuntary, and not merely the becoming drunk. See 12 Cyc. 175.

69. Thus a railroad company may be indicted and fined for neglect of duty to keep a bridge in repair.

of offenses against the person, or of those involving malice or evil intention.<sup>70</sup>

§ 91. **Attempts and Solicitation.** The law does not punish mere intention, but requires some overt act in an attempt to carry that intention into execution.<sup>71</sup> As soon as the attempt is made, the law takes notice of and punishes it. All attempts to commit a crime, whether the crime be a felony or a misdemeanor, and whether it be such at common law or by statute, are misdemeanors at common law. An attempt to commit a crime is an act done with intent to commit that particular crime, and tending to, but falling short of, its actual commission. To constitute an attempt: (1) The act must be such as would be proximately connected with the completed crime; (2) there must be an apparent possibility to commit the crime in the manner proposed; (3) there must be a specific intent to commit the particular crime at the time of the act. Voluntary abandonment of purpose after an act constituting an attempt is no defense. Neither mere words and threats, nor mere preparations to commit a crime, are sufficient to constitute an attempt. It is essential that there shall be some overt act in pursuance of the intent, and more or less directly tending to the commission of the crime. Buying a gun for the purpose of killing another is a mere preparation, and is not an attempt to murder, but it is different if the gun is pointed and the trigger pressed, and probably even if it is merely pointed with intent to shoot and kill. If one walks toward a house intending to commit a burglary, this is not an attempt; but if he tries to open the door, and is unable to do so, it is otherwise.<sup>72</sup>

It has been held in England and some of the States that it is a crime to solicit another to commit a felony, like murder or larceny, or even an aggravated misdemeanor, although the person solicited refuses. Some courts, however, have held the contrary.<sup>73</sup>

§ 92. **Parties in Crimes.** A crime is not always committed by a single individual, but several persons may be concerned in different degrees, some of them by actually doing the deed, others by standing by and abetting it, others by having advised or commanded it, although absent when it is committed, and still others by assisting in the escape of one concerned. Whenever persons join for the purpose of executing a common criminal purpose, each one is the agent of the other, as to all acts in furtherance thereof, and each is criminally liable for such acts of the others. It is otherwise, however, as to acts not in furtherance of the com-

70. See 10 Cyc. 1225; Clark Cr. L. (2d ed.) 76.

71. There is an exception to this rule in the case of conspiracy, unless the conspiring may be regarded as an

overt act, which is doubtful. See *supra*, § 88, c, "Conspiracy."

72. See 12 Cyc. 176; Clark Cr. L. (2d ed.) 126.

73. See 12 Cyc. 182.

mon purpose. Parties concerned in the commission of felonies are principals or accessaries according as they are present or absent when the act is committed, and are further divided into: (1) Principals in the first degree, and (2) principals in the second degree; (3) accessaries before the fact, and (4) accessaries after the fact. This distinction is recognized in felonies only. All who take part in treason, and all who take part in a misdemeanor, if liable at all, are guilty as principals.<sup>74</sup>

A *principal in the first degree* is the person who actually perpetrates the deed, either by his own hand or through an innocent agent.<sup>75</sup>

A *principal in the second degree* is one who is actually or constructively present, aiding and abetting the commission of the deed.<sup>76</sup> (1) He must be present, actually or constructively,<sup>77</sup> and (2) he must aid or abet the commission of the deed.<sup>78</sup> (3) There must be community of unlawful purpose at the time the act is committed.<sup>79</sup> (4) Such purpose must be real on the part of the principal in the first degree.<sup>80</sup>

An *accessary before the fact* is one who is absent when the act is committed, but who has procured, counseled, commanded, or abetted the principal or actual doer of the act to commit it.<sup>81</sup>

74. See 12 Cyc. 183; Clark Cr. L. (2d ed.) 100.

75. A crime is committed through an innocent agent, so as to render one a principal in the first degree, as the actual perpetrator thereof, where he incites a child or an insane person to set fire to a house or to kill another, or procures such a person, or a person ignorant of the facts, to administer poison, or to utter a counterfeit bank-note or a forged instrument. When one acts through an agent he can himself be guilty of a crime in the first degree only where the agent is innocent. See 12 Cyc. 184, 185; Clark Cr. L. (2d ed.) 101.

76. See 12 Cyc. 185; Clark Cr. L. (2d ed.) 102.

77. He need not be an eye and ear witness to the deed. Thus, if a person intends to assist, and is sufficiently near to do so, as where he is watching outside a house, while another is committing a burglary or other felony inside, he is regarded as being present; and the same is true where one is within a convenient distance, with intent to aid in a murder, if his aid is necessary. See 12 Cyc. 185, 186; Clark Cr. L. (2d ed.) 103.

78. To aid or abet the commission

of a crime is to assist or encourage the actual perpetrator. There must be some participation. Mere presence and neglect to endeavor to prevent a felony will not of itself make one a principal in the second degree. The assistance need not be physical, but may consist in mere encouragement. See 12 Cyc. 186, 187; Clark Cr. L. (2d ed.) 103, 105.

79. Acts done by one of a party, but not in pursuance of the arrangement, will not render the others liable as principals. See 12 Cyc. 188.

80. That is, his mental state must be such that, when he perpetrates the deed, he himself will also be criminally liable. This question arises, for example, where a detective pretends to join in a crime for the purpose of entrapping his confederate, and is not guilty when he commits the act, because of his want of criminal intent. See 12 Cyc. 189; Clark Cr. L. (2d ed.) 10.

81. See 12 Cyc. 190.

There must be some participation or instigation to make one an accessary. The bare concealment of the fact that a felony is about to be committed, or failure to endeavor to prevent it is not sufficient (12 Cyc.

An *accessary after the fact* is one who receives, relieves, comforts, or assists another, knowing that he has committed a felony. Three things are necessary: (1) The felony must be completed; (2) the person charged as accessary must do some act to assist the felon personally; and (3) he must know at the time he assists the felon that he has committed a felony.<sup>82</sup>

§ 93. **Modes of Punishment.** The whole efficacy of the criminal law depends upon the punishment of persons who are convicted of crime. The object of this punishment is not, in theory at least, vengeance, but in some cases is designed to work a reform in the criminal, and in others, to protect the community from further criminal acts by the same person and to serve as a warning to others.<sup>83</sup> The punishments inflicted for crimes at common law were capital punishment, imprisonment, fine, pillory, tumbrel or ducking stool for common scolds, the stocks, and whipping for petit larceny and other small offenses.<sup>84</sup> None of these punishments are now inflicted in the United States except capital punishment, imprisonment, and fines, which are the usual modes, and in a few States whipping, which is still inflicted there for some misdemeanors.

Capital punishment is punishment by death, and is in modern times applied only to those guilty of treason or murder, or, in a few States, rape.<sup>85</sup> The usual mode of executing the criminal is to hang him by the neck until dead. In New York and several other States, however, the authorities have adopted the method of electrocution, or killing by an electric shock. In a number of States capital punishment has been abolished, so that life imprisonment is the most severe punishment which can be resorted to.

In every State are maintained various prisons, ranging in importance from the county jails to the State prisons, in which convicted criminals are confined for terms varying according to the character of the offenses of which they are respectively guilty. Imprisonment is the usual punishment for all of the more important crimes, excepting treason and in most States murder.

Fines are usually resorted to only in case of the more petty 191), although it may make one guilty of the substantive crime of misprision or felony (*supra*, § 88, c.).

A person is answerable as an accessary before the fact for all probable consequences which ensue from his counsel or command to do an unlawful act, but he is not liable if the act done is essentially different from that counseled or commanded. See 12 Cyc. 191; Clark Cr. L. (2d ed.) 110.

82. See Clark Cr. L. (2d ed.) 113; 12 Cyc. 192.

83. Smith Elem. L. 140. This, as we have seen, is called sanction. See *supra*, § 2.

84. See 12 Cyc. 957.

Punishment by transportation in England was wholly the creature of statutory regulations.

85. In England larceny, although of small value, was with all other felonies punished by death, and many other statutory offenses were so punished.



offenses. Frequently a criminal is given an option of paying a certain fine or being imprisoned, and sometimes both penalties are applied for the same offense.<sup>86</sup>

The constitution of the United States prohibits the federal government from inflicting cruel and unusual punishments or levying excessive fines, and the constitutions of most of the States contain a similar provision.<sup>87</sup>

86. Smith Elem. L. 140, 141.

87. See 12 Cyc. 963.

## **CHAPTER X**

### **TORTS**

- A. Definition and Nature of Tort in General.**
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#### **A. DEFINITION AND NATURE OF TORT IN GENERAL**

- § 94. Definition and Distinctions — a. In General — Tort and Crime.** A tort may be broadly defined as a breach of legal duty, or the violation of another's right, for which the injured party may

maintain an action at law for damages.<sup>1</sup> Or, to be more accurate, it is an act or omission giving rise, by virtue of the common-law jurisdiction of the court, to a civil remedy which is not an action on a contract.<sup>2</sup> It has also been defined as "an authorized prejudicial interference of some person, by act or omission, with a right *in rem* of another person."<sup>3</sup>

Whenever a right *in rem* exists in one person, there is a corresponding duty on the part of the whole community to observe that right.<sup>4</sup> He who violates it may be guilty of a tort or a crime, according to the legal consequences of his act. If his breach of duty is such as to be regarded as an injury to the community as well as to the individual, it is a crime, and, as we have seen, he is punished for it by the State in its own name. If not, the person injured is left to pursue his remedy in his own behalf, the State merely acting as arbiter between him and the wrong-doer. The same act, as has already been said, may involve both of these results, in which case it is both a tort and a crime,—a crime because the State will punish it; a tort because a private suit for damages may be maintained.<sup>5</sup> A tort is therefore a violation of a right *in rem* which gives rise to a private right of action *in personam* for damages. The moment a right *in rem* is violated, there springs up a new relation between the wrong-doer and the person injured. The latter then has a new right against the former; not, as before, merely a right to claim forbearance, but a right to claim compensation for his injury. This right is not one which he can enforce against the world, but one available against the individual wrong-doer alone—hence a right *in personam*.<sup>6</sup>

b. **Tort and Contract.** The primary distinction between a tort and a breach of contract is that the former is a violation of a right *in rem*, or, as it is usually expressed, a breach of legal duty; while the other is a violation of a right *in personam*—a breach of the specific contract obligation. But, just as the same act may be both a tort and a crime, so may the same act be both a tort and a breach of contract. This is well illustrated by a Maryland case in which

1. Smith Elem. L. 269.

2. 1 Jaggard Torts 2. See "Torts,"  
Cyc. —.

3. Immes Torts, Introd.

4. See *supra*, § 58 *et seq.*

5. Smith Elem. L. 269. See *supra*,  
§ 85.

In England, "until the time of Bracton (A. D. 1250) personal injuries were not the subject of civil action. Even after that period, these subjects were treated under the head of criminal law, and the defendant in such cases, when sued by civil process,

was compelled not only to compensate the plaintiff but also to pay an attendant fine to the king. A trace of this quasi-criminal nature of a tort is left in the allowance to the injured person of punitive or exemplary damages, where the wrong is willful or malicious; because malice is the *mens rea* which is an indispensable ingredient of a crime." 1 Jaggard Torts 8.

6. Smith Elem. L. 269, 270; and  
*supra*, § 59.

an action for personal injuries was brought against a street railroad company. The plaintiff became a passenger on the defendant's railway, thus entering into a contract for safe carriage to her destination, and, while on the defendant's car, was injured. She sued in tort for her injury. The defendant contended that the wrongful act was merely a breach of contract; but it was held that the defendant owed to the plaintiff and to the public in general a duty to be careful, irrespective of contract, and that the negligent violation of that duty was a tort as well as a breach of a contractual obligation.<sup>7</sup> And, as a general rule, there is nothing to prevent a promise to observe one's legal duty becoming an element in a contract, in which case a breach of that duty will also be a breach of the contract.<sup>8</sup>

§ 95. **The Elements of a Tort—In General.** No cause of action arises out of damage or loss without a wrongful act or omission; nor will an action lie for a wrongful act or omission, unless injury or loss results therefrom either in fact or by implication of law. Therefore a tort may be said to consist of two elements, namely, (1) a wrongful act or omission; and (2) an injury or loss resulting therefrom.<sup>9</sup> To this we may add that the person injured may, by his own wrong or consent, be precluded from recovering,<sup>10</sup> and that in certain cases the person causing the injury may not be liable because of personal irresponsibility or because of some exception or exemption recognized by the law.<sup>11</sup>

Jaggard says that recovery can be had in tort, it would seem, only when the following elements of a cause of action are shown: (1) Parties — (a) a plaintiff not disentitled by his own wrong or consent, and (b) a defendant not personally irresponsible when personal responsibility is essential, and not within admitted exceptions or exemptions; (2) a legal duty recognized by the trial court as owed by the defendant to the plaintiff; (3) a violation of that duty in fact by the defendant; and (4) damage to the plaintiff conforming to the standard of the law as the proximate result, except when, on proof of mere violation of duty, the law infers damages.<sup>12</sup> These elements will be considered in the following sections.

§ 96. **The Wrongful Act or Omission.** In the first place, whenever an action is brought for a tort, it is necessary to show that the defendant has violated some legal duty which he owed to the plaintiff, or to put it in another way that he has violated some legal right of the plaintiff. Mere intention to do wrong is not action-

7. *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74.

8. *Smith Elem. L.* 270. And see "Torts," — *Cyc.* —

9. *Smith Elem. L.* 271; "Torts," — *Cyc.* —

10. See *infra*, § 104.

11. See *infra*, §§ 102, 103.

12. 1 Jaggard Torts 106.

able;<sup>13</sup> nor will an action lie for loss or damage without any violation of duty. The plaintiff must prove some act or omission on the part of the defendant, and one which was wrongful. It is quite possible for an act which injures another to be innocent in itself. For example, a person may enter into legitimate competition with his neighbor, thus lessening the latter's business; or, again, the injury may be the result of pure accident. In these cases there can be no recovery of damages, because there has been no wrong.<sup>14</sup> This principle is expressed in the Latin phrase, *damnum absque injuria*,<sup>15</sup> which means damage done without any wrong or violation of any right of the plaintiff.

The wrong, however, need not necessarily be committed by a positive act. It may consist, as we shall see, in negligence, and there may be negligence in omission as well as in commission. Mere failure to act is often the gist of liability.<sup>16</sup> The wrongful act or omission, therefore, may consist (1) of non-feasance, or the non-performance of that which it is one's legal duty to perform; (2) of misfeasance, or the performance in an improper manner of that which it is one's legal right to do; or (3) of malfeasance, or the doing of that which one is under a legal duty to refrain from doing.<sup>17</sup>

§ 97. **The Loss or Damage.** It is sometimes necessary to show, in order to maintain an action, not only that there has been a wrongful act or omission, but also that actual loss or damage has resulted therefrom.<sup>18</sup> This principle is expressed in the Latin phrase *injuria absque* (or *sine*) *damno*, which means wrong without damage. It is usually held, however, that, where there is a clear violation of a legal right, the law will conclusively presume that damage has resulted, even though none has been or can be shown. In such a case the court will award nominal damages in recognition of the right.<sup>19</sup> For example, an action will lie for an assault, or for a trespass upon real or personal property, without showing any actual damage;<sup>20</sup> but proof of actual loss or damage

13. "Mere intention to do wrong, or mere malice, not resulting in conduct which violates a right or duty, is not actionable. . . . You cannot sue a man for the state of his mind. . . . Mere malice is not *per se* actionable. Bad motive for conduct is of itself no tort. Wrongful intention cannot make lawful conduct unlawful, or a proper intention make unlawful conduct lawful. Malicious motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful. 'The best intention cannot prevent an act from being a nuisance, when it other-

wise is such; and the worst intention cannot make an act a nuisance when it otherwise is not.'" 1 Jaggard Torts 55, 56.

14. Smith Elem. L. 271; 1 Jaggard Torts 35; "Torts," — Cyc. —.

15. Damage without wrong or legal injury.

16. 1 Jaggard Torts 35; and *infra*, § 124.

17. Smith Elem. L. 271.

18. Smith Elem. L. 271.

19. Smith Elem. L. 271.

20. 1 Jaggard Torts 81, 83; and *infra*, §§ 106, 118.

is necessary to sustain an action for deceit, for negligence, or, except in certain cases, for slander or libel.<sup>21</sup>

Jaggard says: "The simple truth is that sometimes plaintiff can recover when he has not shown damage, and sometimes he cannot. On the one hand, mere damage may not constitute a cause of action, in the absence of violation of duty. On the other hand, mere violation of duty may not constitute a cause of action, in the absence of damage. There may be no such thing as a legal 'wrong without damage'; but sometimes there cannot be a legal wrong unless there has been damage. In some cases the law presumes damage, and in some cases damage must be proved. In other words, there are two kinds of rights — one a simple right, the infringement of which is, in the absence of exceptional circumstances, necessarily actionable; the other is a right not to be harmed, the violation of which is actionable only when harm is suffered."<sup>22</sup>

§ 98. **The Mental Element in Torts.** The law of torts regards primarily, and in some cases exclusively, the conduct and not the mental attitude of the wrong-doer. He may be held liable in tort for his conduct, although he may not have been conscious of wrongdoing.<sup>23</sup> Intention is the essence of criminal liability. In some classes of cases of the law of torts this is also true, but in others, and perhaps ordinarily, the law of torts does not depend upon intention, or the mental attitude of the wrong-doer. In consequence, many persons incapable of committing a crime because of mental incapacity, as in the case of infants of tender years and insane persons, are held liable for torts.<sup>24</sup>

If one man takes and sells the property of another under the honest but mistaken belief that he has title to it, he is not guilty of larceny;<sup>25</sup> but under such circumstances he is liable to the true owner of the property in an action of tort for conversion, however innocent his intention may have been.<sup>26</sup> So if a person by *bona fide* mistake, notwithstanding every precaution to keep within his own lines, goes upon the land of another, he is liable in trespass.<sup>27</sup>

"Perhaps," says Jaggard, "the commonest conception of liability in tort is expressed by the phrase, that a man acts 'at his peril.' He insures the world against wrong on his part. A duty to avoid harm to others is regarded as absolute. Breach of that duty, and consequent damage, is sufficient to create responsibility without reference to his mental attitude — that is, his conscious-

21. 1 Jaggard Torts 83, 84; and *infra*, §§ 110, 111, 124.

22. 1 Jaggard Torts 80.

23. 1 Jaggard Torts 54, 57; "Torts," — Cyc. —.

24. 1 Jaggard Torts 9; *supra*, § 90, b, c; *infra*, § 103.

25. See *supra*, § 68, b, p. 111.

26. 1 Jaggard Torts 10, 57; and *infra*, § 119.

27. 1 Jaggard Torts 57; *infra*, § 118.

ness or intention. Whether legal wrong has been done for which the law affords reparation in damages depends upon the nature of the conduct, and cannot consistently be made to depend upon the motive of the person doing it."<sup>28</sup> Interference with the person of another by a blow, or restraining another's freedom of locomotion, or interference with real property by going upon it, or with personal property by taking it away, keeping, using, or destroying it, is generally regarded as conduct which violates absolute duties, and which creates corresponding absolute rights to redress. So, if an act complained of is a nuisance, the person creating and maintaining it is said to be absolutely liable, no matter how proper his motive and how useful his purpose.<sup>29</sup>

There are some torts, however, in which the mental element is material — torts in which liability is based on personal fault. Liability is so based in the wrongs of deceit, slander, libel, and malicious prosecution.<sup>30</sup> So, also, to induce one to break a contract with another, if there is neither malice nor fraud, is not actionable; although malicious interference with contract is a generally recognized tort.<sup>31</sup> "At the one extreme there are cases in which culpability is not an element, in which the defendant is held liable, although he may not be to blame; as trespass to person or property, and breach of duty to insure safety. At the other extreme moral wrong is material to wrongs of malice and fraud."<sup>32</sup>

Again, there may be no intention of doing harm, but, for want of due care to guard against injury to others, conduct innocent in itself may become tortious. This want of advertence to natural and probable consequences attaches liability by what is called "negligence."<sup>33</sup>

28. 1 Jaggard Torts 49.

29. 1 Jaggard Torts 51.

If a person gathers water in dangerous quantities on his own land, and it escapes and damages another's land, the latter can recover, although the former exercised due care. A person is bound under such circumstances to insure the safety of third persons against harm from the dangerous agency he has collected on his premises. 1 Jaggard Torts 51.

30. 1 Jaggard Torts 52, 56, 57; *infra*, §§ 110, 111, 113.

31. 1 Jaggard Torts 57, note; *infra*, § 117.

32. 1 Jaggard Torts 53.

33. 1 Jaggard Torts 58; *infra*, § 124.

"The truth of the matter would

seem to be that negligence, so far as the mental attitude of a person charged with that kind of wrongdoing is concerned, is used in a double sense. It sometimes refers to a breach of duty unqualified in its nature, as the negligent keeping of fire, negligent storage of water, or the negligent keeping of dangerous animals. In these cases the conduct of the wrongdoer may have been perfectly reasonable and careful throughout, and yet he may be liable. But negligent driving, or the negligent handling of a gun, indicates a very different source of liability, arising, not from the nature of the thing done, but from want of forethought in the doing of it." 1 Jaggard Torts 59.

§ 99. **How Liability for Tort May Attach.** Conduct may attach liability for tort in one or more of five ways, namely:

(1) By personal commission; as where one man assaults, slanders, or imprisons another, or trespasses upon or takes the property of another, or carelessly does him harm, in which cases the tort is properly his own.<sup>34</sup>

(2) By consent or command; the maxim being "*qui facit per alium, facit per se*"—meaning that he who does an act through another does it himself. Whoever commands the commission of a wrong by another does that wrong himself, not by actual, personal commission, but by constructive identity.<sup>35</sup> Liability for torts committed by another person may also attach by ratification of the tort after its commission.<sup>36</sup>

(3) By virtue of relationship. Thus at common law a husband was liable for the torts of his wife.<sup>37</sup> So when a servant, contrary to orders, and without the knowledge of the master, assaults the master's customer or passenger, the master is sometimes held responsible, not because the tort is really his, but because of the relationship he bears both to the servant and the person injured.<sup>38</sup>

(4) Because of instrumentalities. Whoever uses, owns, or controls things which are in themselves dangerous, as a wild beast, or which may become dangerous in fact, as an engine, may become liable for harm done by such instrumentalities.<sup>39</sup>

(5) Because of conduct operating essentially as estoppel. There are cases in which a person may be held responsible in an action for tort when he cannot be said to have committed the tort in any ordinary sense. If a man illegally enriches himself to the impoverishment of another, the law will make him disgorge, as in the case where one has innocently, but without right, come into possession of another's property.<sup>40</sup> So, in cases of fraud, the principal may be guilty of no personal wrong, and not be guilty because of the relationship with the agent who committed the tort, and still be held liable because of unjust enrichment.<sup>41</sup>

§ 100. **Proximate and Remote Cause.** The law holds him responsible whose wrongful act is the proximate, as distinguished from the remote, cause of the injury. In determining liability for a given harm suffered, the fundamental question is, did the party charged cause the harm? In ascertaining this the courts

34. 1 Jaggard Torts 37.

35. 1. Jaggard Torts 37, 38. See *infra*, § 148.

36. 1 Jaggard Torts 43. See *infra*, § 149.

37. This, however, has been very generally changed by statute. See *infra*, § 153, e.

38. 1 Jaggard Torts 39. See *infra*, § 175.

39. 1 Jaggard Torts 37, 39. See *supra*, § 98; *infra*, § 124.

40. 1 Jaggard Torts 37, 40.

41. 1 Jaggard Torts 42. See *infra*, § —.



naturally select the proximate and not a remote cause.<sup>42</sup> The injury may stand in various relations to the wrongful act. (1) It may result directly and proximately from it, as where a person knocks another down, in which case the injury is as direct as it is possible to be. (2) It may be indirect, but proximate. Let us suppose that employees of a city are engaged in making excavations in the streets for the purpose of constructing sewers. It becomes their legal duty to keep warning lights at the places of danger during the night. By reason of a failure to maintain the necessary signals, a pedestrian falls into one of the excavations, and is injured. Here the wrongful act is, not the maintenance of the excavations, but the failure to put up the lights. It is not as the direct, but only as the indirect or consequential, result of this failure, that the pedestrian is injured. Yet it is the proximate result. (3) The injury may result from the wrongful act remotely. In such a case there is always an intervening proximate cause, to the author of which the law looks as the responsible party.<sup>43</sup> Conduct is a legal cause when, in the usual course of nature, under the circumstances of the case, the damage complained of results as a natural and probable consequence.<sup>44</sup>

## B, VARIATIONS IN THE NORMAL RIGHT TO SUE

§ 101. **In General.** Liability for torts normally extends to every person, natural or artificial; but the law recognizes certain general or special modifications of and exceptions to, or exemptions from, such liability. These variations in the normal right to sue may be based: (1) On the privilege of the actor, or general exemption; (2) on his status; or (3) on the conduct of the plaintiff—his wrongdoing or consent.<sup>45</sup> We shall now shortly consider these in the order named.

§ 102. **Variations Based on Privilege of Actor, or General Exemption — a. In General.** Under the head of variations based on privilege of the actor, or general exemption, we will consider (1) public acts, including acts of the state, conduct of legislators, conduct of judicial and quasi-judicial officers, and conduct of executive officers; and (2) private acts authorized by statute or by the common law.<sup>46</sup>

42. 1 Jaggard Torts 61. And see 29 Cyc. 488 *et seq.*

As Lord Bacon said, "It were infinite for the law to judge of cases and other impulsions one of another, and therefore contenteth itself with the immediate cause, and judgeth of acts by them, without looking to any

further degree." Bacon *Maxims*, Reg. 1.

43. Smith Elem. L. 272.

44. 1 Jaggard Torts 74. And see 29 Cyc. 490 *et seq.*

45. 1 Jaggard Torts 32, 109.

46. 1 Jaggard Torts 109.

**b. Public Acts.** The state, except by its own clearly manifested consent, is not liable to individuals for injuries it may cause; and this exemption applies alike to the United States government, the governments of the various States, and to foreign sovereignties. The exemption of the state from liability for all torts is based upon its sovereign character. The duties it performs are all public, and it cannot be held liable for any imperfections in their performance.<sup>47</sup> The state may, however, consent to be impleaded in court, and to be held liable in damages for tortious conduct, by unqualified appearance in a judicial proceeding brought against it, or by legislative act or resolution, and it frequently does so.<sup>48</sup>

Members of the legislature are exempt from liability for anything said or done by them, as representatives, in the functions of their office, whether regular or irregular, and even though against the rule of the legislative bodies; but the agents or servants of the legislature — the sergeant-at-arms, for example — may be held personally responsible for conduct pursuant to the direction of the legislature, when such authority is not legal.<sup>49</sup>

No judge can be held personally liable to any one, in a civil action, for conduct in the exercise of jurisdiction clearly conferred, even though his conduct may be malicious and corrupt.<sup>50</sup> The exemption does not apply, however, to conduct occurring in the performance of ministerial, as distinguished from judicial, duty, and the duty is ministerial when the law governing its discharge prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion.<sup>51</sup> No judge of the courts of record having supreme or general jurisdiction can be held liable, even for corrupt and malicious conduct, with respect to matters which are in excess of, but not in the complete absence of, jurisdiction; but under such circumstances, by the weight of authority, a judge of an inferior court, not of record, like a justice of the peace or police magistrate, is personally liable.<sup>52</sup> Where there is clearly no jurisdiction over the subject-matter, any authority exercised is usurped, and for its exercise, when the want of jurisdiction is known to the judge, no excuse is permissible.<sup>53</sup>

In so far as a public officer or institution executes the authority or performs the functions of the government, the exemption of the state from wrong applies to him. Private individuals, therefore,

47. 1 Jaggard Torts 110.

48. 1 Jaggard Torts 111. See "States," — Cyc. —; "United States," — Cyc. —.

49. 1 Jaggard Torts 114. See 25 Cyc. 376; 29 Cyc. 1440 *et seq.*; "States," — Cyc. —.

50. 1 Jaggard Torts 116. See 23 Cyc. 568 *et seq.*; 24 Cyc. 421 *et seq.*

51. 1 Jaggard Torts 116. See 23 Cyc. 571; 24 Cyc. 425.

52. 1 Jaggard Torts 121. See 23 Cyc. 569; 24 Cyc. 423.

53. 1 Jaggard Torts 123. See 23 Cyc. 570; 24 Cyc. 423.

cannot recover damages resulting from conduct violating a duty owed solely to the public and imposed by the state on its executive officers, instrumentalities, or agents. Such damages are the results of a purely public wrong, and therefore are not subject to private action.<sup>54</sup> Damages may, however, be recovered against executive public officers: (1) For conduct in the course of performance of public duties, provided (a) such conduct violates a duty to an individual, in the performance of which he has a particular interest, even though that duty be also owed to the public, and (b) provided the plaintiff suffers from special individual wrong, as distinguished from the wrong done in the community generally; and (2) for unauthorized conduct in the course of performance of official duty.<sup>55</sup>

A public officer not ministerial is not responsible for the tortious conduct of an official subordinate, unless in some way personal fault is attributed to him, as where he has been guilty of negligence, or has directed or participated in the wrong; but ministerial officers are, in general, liable for wrongs caused by deputies, as distinguished from private servants.<sup>56</sup>

c. **Private Acts.** Where there is no excess or abuse of authority, no action lies to recover damages incident to an act authorized either (1) by statute or municipal ordinance, or (2) by the common law. Acts so authorized may be classed as (a) ordinary rights; (b) disciplinary powers; (c) rights of necessity; and (d) the right of private defense.<sup>57</sup>

No action lies for damage to property where such damage is expressly authorized by statute, or is, physically speaking, the necessary consequence of what is authorized. Thus, the legislature may grant the right to maintain what would otherwise be a local nuisance.<sup>58</sup> The rule does not apply, however, where the power or right is exercised negligently, improperly, or, perhaps, maliciously. In such cases there is liability, not for the act itself, but by reason of the manner of doing it.<sup>59</sup>

The exercise of ordinary rights for a lawful purpose and in a lawful manner is not actionable, even though it causes damage. This immunity in the exercise of common rights is a restatement, in somewhat different form, of the doctrine embodied in the phrase "*damnum absque injuria*."<sup>60</sup> The right to transact lawful business is a universal one. Damages consequent upon competition are not actionable.<sup>61</sup> How far a man may use his own property

54. 1 Jaggard Torts 125. See 29 Cyc. 1441 *et seq.*; "States," — Cyc. —.

55. 1 Jaggard Torts 125. See 29 Cyc. 1440 *et seq.*

56. 1 Jaggard Torts 137. See 29 Cyc. 1445.

57. 1 Jaggard Torts 139.

58. 1 Jaggard Torts 140. See 29 Cyc. 1159, 1197.

59. 1 Jaggard Torts 143. See 29 Cyc. 1197 *et seq.*

60. See *supra*, § 96.

61. 1 Jaggard Torts 145, 146.

without making himself liable in tort will be fully considered in the special course on torts.<sup>62</sup>

The law recognizes disciplinary powers in private persons and associations, and damages consequent upon their reasonable exercise cannot be recovered.<sup>63</sup> Thus, persons exercising quasi-judicial powers, as the officers of universities, colleges, clubs, beneficial associations, corporations, and the like, are not liable for removing a man from office or membership, or otherwise dealing with him to his disadvantage, provided (1) they act in good faith; (2) give him fair and sufficient notice of his offense; (3) give him an opportunity of defending himself; and (4) and observe the rules, if any, laid down by the statute or the particular body to which they belong.<sup>64</sup>

Other persons may also possess disciplinary powers, for the reasonable exercise of which they are not liable in tort. Thus, the master of a merchant-ship may use summary force in preserving order and discipline; and parents, guardians, teachers, and other persons *in loco parentis*, that is, occupying the place of parent, may justify the enforcement of discipline, moderate correction, detention, and the like, by plea of authority.<sup>65</sup>

There is no liability for acts or omissions as to which a person has no option. "The rights of necessity are a part of the law."<sup>66</sup> Thus, necessity may justify the destruction of private property for the general good, as where a house is pulled down to prevent the spread of a dangerous fire.<sup>67</sup> *A fortiori*, peril to human life may constitute such necessity as would excuse what would otherwise be a wrong, as where a person suffering from an infectious disease is carried from a burning house through the crowd at the risk of infecting some of them.<sup>68</sup> On the same principle, where a highway becomes obstructed and impassable from temporary causes, such as a snowdrift, a traveler may go upon adjoining land of another in order to pass, without being guilty of trespass.<sup>69</sup>

With respect to the right of private defense, the law recognizes the right to repel unlawful force by force, in the defense of person and property or possession, whenever there is a real or apparent necessity for the defense, honestly believed to be real; but the acts of defense must be confined to defense, and, in themselves, reasonable, careful, and not excessive.<sup>70</sup>

**§ 103. Variations Based on Status — a. In General.** The purpose of an action for tort is not, primarily, to punish the wrong-

62. See 29 Cyc. 1159 *et seq.*

63. 1 Jaggard Torts 148.

64. 1 Jaggard Torts 148. See 4 Cyc. 302; 7 Cyc. 262, 288.

65. 1 Jaggard Torts 149. See 3 Cyc. 1078.

66. 1 Jaggard Torts 149.

67. 1 Jaggard Torts 149. See "Trespass," — Cyc. —.

68. 1 Jaggard Torts 150.

69. 1 Jaggard Torts 150.

70. 1 Jaggard Torts 151. See 3 Cyc. 1070 *et seq.*, 1078; and *supra*, §§ 88, b, 89, j; *infra*, § 106.

doer — the criminal courts do that,— but to make good the damage the injured party has suffered, and, incidentally perhaps, to deter others from evil, as where exemplary or punitive damages are allowed. Accordingly it is generally immaterial whether the defendant in an action on a tort be natural or artificial, responsible or irresponsible, or whether his conduct was intentional or unintentional, so far as the mere right, but not the extent, of the plaintiff's recovery is concerned.<sup>71</sup> There are, however, some variations in the normal right to sue for tort, based upon the status of the actor or of the person injured, and these may be now considered.

**b. Infants, Insane and Drunken Persons, Convicts, Aliens, and Married Women.** As will be hereafter explained more at length, infants are generally liable in law for their torts, not connected with contract, to the same extent as adults; but tenderness of age, in proportion as it affects capacity to act intelligently, may be material in determining the liability of infants for tort, when intention to do wrong or want of care is an essential ingredient of the injury; and, since infants are not liable on their contracts,<sup>72</sup> they cannot be held responsible by being sued in tort on a cause of action which is really on contract, where the law allows choice of form of action.<sup>73</sup>

An insane person is liable, to the extent of the actual damage, for torts involving no mental element; but it is generally held that he is not liable for torts of which malice is an essential element, like malicious prosecution, and libel or slander; nor is he liable for exemplary damages.<sup>74</sup>

Drunken persons are liable for all torts committed by them.<sup>75</sup>

In England a convict not lawfully at large cannot sue in tort, but the rule is otherwise in the United States.<sup>76</sup> He may be sued for a tort.<sup>77</sup>

An alien other than an alien enemy may either sue or be sued for tort.<sup>78</sup>

At common law a married woman, subject to certain exceptions, could not sue or be sued alone for torts, but her husband was liable for her torts and could sue for torts committed against her. These rules, however, have been very generally changed by statute, so that now she may either sue or be sued, as the case may be.<sup>79</sup>

**d. Private and Public Corporations.** Private corporations are liable for their torts committed under such circumstances as would attach liability to natural persons; and the fact that the conduct complained of necessarily involved malice or was beyond the scope

71. 1 Jaggard Torts 33.

72. See *infra*, § —.

73. See *infra*, § 179.

74. See *infra*, § 185.

75. See *infra*, § 187.

76. 1 Jaggard Torts 166. See 9 Cyc. 874.

77. See 9 Cyc. 874.

78. See 2 Cyc. 104, 106.

79. See *infra*, § 153, e, g.

of the powers of the corporation constitutes no defense to their liability.<sup>80</sup>

Municipal corporations, like cities and villages, are sometimes, but not ordinarily, liable for their torts. Their liability depends largely upon construction of the legislation creating them. In general, they are not liable for (1) conduct in performance of governmental, as distinguished from merely corporate, functions; (2) for unauthorized conduct of officers and agents; or (3) for authorized acts.<sup>81</sup> Involuntary quasi-municipal corporations, like counties, are subject to even a less extended liability for civil wrongs.<sup>82</sup> Thus municipal corporations are not liable for damages consequent upon conduct of fire, police, health, or public park departments, or for the exercise or non-exercise of a discretionary, legislative or judicial power, as distinguished from a ministerial power.<sup>83</sup> On the other hand they are generally held liable for negligence in the construction, maintenance, or use of their streets, sidewalks, sewers, etc.; and they are answerable in damages for trespasses upon private property, and for maintaining a nuisance.<sup>84</sup>

Where a corporation, not municipal or quasi-municipal, is engaged in public works, as in the case of a private corporation maintaining and operating a canal, bridge, ferry, railroad, gas-works, water-works, etc., its liability for tort is determined by the rules applying to private corporations, whenever such works are operated for profit;<sup>85</sup> and its exemption is limited by rules as to municipal corporations, when it is a public charity.<sup>86</sup>

§ 104. Variations Based on Conduct of Person Injured. While the law recognizes a normal right of every one against whom a tort is committed to secure legal redress therefor, this right may be defeated by plaintiff's own conduct. One suing to recover damages for an alleged tort may therefore be deprived of the right to relief (1) by his own wrong-doing, or (2) by his consent.<sup>87</sup>

*Plaintiff's Wrong.*—That one's own wrong may prevent him from recovering damages for what would otherwise be a tort is well settled. "The law will not interfere to do justice between, nor lend its aid to those who have violated it."<sup>88</sup> Plaintiff's wrong may consist in conscious wrong, or in mere inadvertence or negli-

80. 1 Jaggard Torts 167.

81. 1 Jaggard Torts 173. See 28 Cyc. 1256 *et seq.*

82. 1 Jaggard Torts 173. See 11 Cyc. 497 *et seq.*

83. 1 Jaggard Torts 175. See 28 Cyc. 1256 *et seq.*

84. 1 Jaggard Torts 175-177. See 28 Cyc. 1256 *et seq.*

85. 1 Jaggard Torts 184. See 5 Cyc. 1090; 6 Cyc. 273; 19 Cyc. 508; "Railroads," — Cyc. —; "Street Railroads," — Cyc. —.

86. 1 Jaggard Torts 184, 187. See 4 Cyc. 365; 21 Cyc. 1108.

87. 1 Jaggard Torts 30, 189.

88. 1 Jaggard Torts 189.

A fraudulent transaction, in which both parties have knowingly participated, will not support a judgment for the plaintiff, nor a judgment for affirmative relief for the defendant. 1 Jaggard Torts 190.

gence.<sup>89</sup> Thus the cases are numerous in which an action for negligence of another resulting in personal injuries has been defeated by showing contributory negligence on the part of the plaintiff.<sup>90</sup>

In order, however, that plaintiff's wrong-doing may prevent his recovery, it must have been connected as a proximate cause of the tort. Thus if a person rides his horse faster than the law allows, this does not justify a cow-boy using his lasso to throw the horse.<sup>91</sup> And while the mere fact that a person or his property are involved in wrong-doing does not create the duty on the part of another of exercising diligence to avoid doing harm, it does not justify the latter either (1) in malicious or wanton maltreatment, or (2) in failing to take proper care to avoid harm after he has or ought to have knowledge of impending and avertible danger.<sup>92</sup>

*Plaintiff's Consent.*—Again, before the conduct complained of, the plaintiff may have actually or impliedly consented to what would otherwise be a tort, and be thereby precluded from relying on the conduct as a tort; the general rule being that no action can be maintained for damages arising from conduct to which the plaintiff consented, provided the conduct was not criminal.<sup>93</sup> "Harm suffered by consent is not, in general, the basis of a civil action. This is the meaning of the maxim, '*Volenti non fit injuria*.'"<sup>94</sup> The English phrase is, 'Leave and license.'"<sup>95</sup> Thus, a football player cannot complain of damage suffered in accordance with the rules of the game.<sup>96</sup>

This exemption is limited, however, (1) to cases involving consent as distinguished from mere knowledge, and the exercise of option as distinguished from compulsion; and (2) to cases coming within the limits fixed by the person assenting and permitted by law.<sup>97</sup> Knowledge is not consent; and consent to a wrong, induced by fraud, duress, or conspiracy is no answer to an action by the party so consenting against the party so procuring the assent.<sup>98</sup>

Consent justifies only so far as it goes. Consent to the performance of a surgical operation will justify the use of such force as is necessary to its performance, but it will not prevent an action by the patient for intentional violence or negligence on the part of the surgeon.<sup>99</sup>

89. 1 Jaggard Torts 32.

90. See 29 Cyc. 507 *et seq.*; *infra*, § 124.

91. 1 Jaggard Torts 32, 189.

92. 1 Jaggard Torts 189, 195, 197.

93. 1 Jaggard Torts 31, 199.

94. "He who consents cannot receive an injury."

95. 1 Jaggard Torts 199. See 3 Cyc. 1070.

96. 1 Jaggard Torts 31.

97. 1 Jaggard Torts 199.

98. 1 Jaggard Torts 200, 201.

99. 1 Jaggard Torts 31, 202.

Again, as a general rule, the law does not recognize consent to an illegal act. It does not recognize consent to conduct unlawful, or forbidden by positive law, or for the doing of which a penalty is attached and announced. A prize-fight is generally illegal, and it has been held that notwithstanding the consent of the parties in participating therein, one of them may sue the other for damages.<sup>1</sup>

### C. PARTICULAR TORTS.

§ 105. *Classification of Torts.* It is difficult to make a satisfactory classification of torts or civil wrongs. The most satisfactory classification is that of Sir Frederick Pollock, the leading English authority on the subject. As he points out, they are capable of a three-fold division according to their scope and effects. Thus there are wrongs affecting one in the safety and freedom of his person, in honor and reputation, or in estate, condition, and convenience of life generally—the word “estate” being here understood, as he says, in its widest sense, as when we speak of those who are “afflicted or distressed in mind, body, or estate.” There are other wrongs which affect specific rights of possession and property, or rights in the nature of property. And there are yet others which may affect, as the case happens, person or property, or both. His grouping of torts along these lines is as follows, except that we have added several torts not enumerated by him:

#### GROUP A.

##### *Personal Wrongs.*

1. Wrongs affecting safety and freedom of the person:  
Assault, battery, false imprisonment, seduction.
2. Wrongs affecting personal relations in the family:  
Seduction of daughter, intercourse with another's wife, enticing away of servants, etc.
3. Wrongs affecting reputation:  
Slander and libel.
4. Wrongs affecting estate generally:  
Deceit, slander of title, fraudulent competition by colorable imitation, etc.  
Malicious prosecution and abuse of process, conspiracy.  
Malicious interference with contract.

#### GROUP B.

##### *Wrongs to Possession and Property.*

1. Trespass: (a) to land.  
(b) to goods.

1. 1 Jaggard Torts 31, 203. See 3 Cyc. 1070.



Conversion and unnamed wrongs *ejusdem generis*.

Waste.

Disturbance of easements, etc.

2. Interference with rights analogous to property, such as private franchises, patents, copyrights, trade-marks.

## GROUP C

### *Wrongs to Person, Estate, and Property Generally*

1. Nuisance.
2. Negligence.
3. Breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous callings. This kind of liability results partly from ancient rules of the common law of which the origin is still doubtful, partly from the modern development of the law of negligence.<sup>2</sup>

§ 106. **Assault and Battery.** An assault, as a tort,<sup>3</sup> is an attempt with force or violence to inflict corporal injury on another, accompanied by apparent physical means to effect such injury if not prevented.<sup>4</sup> In every case there must be an attempt. Threats alone are not sufficient. Mere words, unaccompanied by any act indicating an intention to carry the threat into execution, do not constitute an assault.<sup>5</sup> Words may qualify an action or gesture which would ordinarily be considered an assault and prevent it from being so by showing that there is no intention to do the violence.<sup>6</sup>

A battery, or assault and battery, is the wilful and wrongful touching of the person of another by the aggressor or by some substance put in motion by him; or in other words, battery is the unpermitted application of force to the person of another.<sup>7</sup> Every assault, where carried to the extent of physical attack, becomes a

2. Pollock Torts 7, 8.

3. As to criminal assault see *supra*, § 88, c.

4. 1 Jaggard Torts 431; Cooley Torts 160; 3 Cyc. 1066.

Whenever a real attempt is present, and the assaulted person is aware of such attempt, there can be no question that an assault is committed. Apparent attempt occurs when there is no actual purpose or intent to do the injury threatened, but a display of force under such circumstances as to cause one reasonably to expect and fear the injury. 1 Jaggard Torts 431, 432.

5. 1 Jaggard Torts 432; 3 Cyc. 1022.

6. Thus, where an angry man said to another with a threatening gesture that he would knock him down if it were not for his gray hairs, it was held that the qualifying words prevented the act from being an assault. 1 Jaggard Torts 432; 3 Cyc. 1067.

7. 1 Jaggard Torts 434; 3 Cyc. 1066.

It consists in any violent, angry, rude, insolent, or unauthorized touching or striking of a person, either by the party guilty of the battery, or by any substance put in motion by him. 1 Jaggard Torts 434; 3 Cyc. 1067.

battery, and every battery includes an assault. Battery is an accomplished assault.<sup>8</sup>

Defenses to an action for assault and battery may operate by way either (1) of justification, or (2) of mitigation. Justification may be shown by bringing the force within the limits of (a) private defense, or (b) legal authority, public or private.<sup>9</sup> Thus assault is justifiable if committed in self-defense; but abusive words, written or spoken, malignant leers, or taunting gestures, even though made for the purpose of inducing an assault, do not justify it.<sup>10</sup> A man also has a right to use necessary force to protect his family, neighbors, or servants, from violence, and a child may use necessary force to protect his parent or brother, etc.<sup>11</sup> A man may also, subject to some limitations, justify an assault and battery in defense of his lands, his house, or his personal property.<sup>12</sup> In all cases force used in private defense must not exceed the necessity of the case. Defense is not attack. Excessive defense may become an actionable assault and battery.<sup>13</sup>

Where an officer of justice is charged with an assault and battery, it is a good defense to show that he was at the time engaged in the execution of his official duties, and that the act complained of was done in their discharge; but an officer may become civilly liable if he uses unnecessary force.<sup>14</sup> Parents may reasonably chastise their minor children, but excessive cruelty, arising from malicious motive and resulting in injury to the child, is not justifiable because of parental authority.<sup>15</sup> A teacher may moderately punish a pupil for violation of reasonable rules of order, unless prevented by statute, but will become liable if the punishment is immoderate.<sup>16</sup>

Leave and license, or consent, from the person injured will constitute a defense if the act is not illegal, but not otherwise, for consent cannot justify an illegal act.<sup>17</sup> Nor does provocation justify. But leave and license, and provocation so recent that the mind of the wrong-doer has not had time to cool, may serve to mitigate punitive damages, although not actual or compensatory damage.<sup>18</sup>

The action will not lie where the injury was unavoidable or was the result of pure accident, and the party sought to be charged was guilty of no want of care.<sup>19</sup>

- |                                 |                                  |
|---------------------------------|----------------------------------|
| 8. 1 Jaggard Torts 434.         | 15. 1 Jaggard Torts 443; 20 Cyc. |
| 9. 1 Jaggard Torts 439.         | 1585.                            |
| 10. 1 Jaggard Torts 439, 440; 3 | 16. 1 Jaggard Torts 444; 3 Cyc.  |
| Cyc. 1073.                      | 1078.                            |
| 11. 1 Jaggard Torts 440; 3 Cyc. | 17. 1 Jaggard Torts 444; 3 Cyc.  |
| 1075.                           | 1070; <i>supra</i> , § 104.      |
| 12. 1 Jaggard Torts 441; 3 Cyc. | 18. 1 Jaggard Torts 444; 3 Cyc.  |
| 1070.                           | 1070, 1077.                      |
| 13. 1 Jaggard Torts 442; 3 Cyc. | 19. 3 Cyc. 1069.                 |
| 1070 <i>et seq.</i>             |                                  |
| 14. 1 Jaggard Torts 443; 3 Cyc. |                                  |
| 1076 <i>et seq.</i>             |                                  |

§ 107. **False Imprisonment.** False imprisonment is the unlawful and total restraint of the liberty of the person of another.<sup>20</sup> The restraint must be illegal, but need not be malicious.<sup>21</sup> Every confinement of the person of another is an imprisonment, whether it be in a common prison or a private house, or even by forcibly detaining him in the public street or elsewhere.<sup>22</sup> Actual manual touching of the body is not necessary.<sup>23</sup>

Defenses peculiar to actions for false imprisonment may operate by way either of (1) justification, or (2) mitigation. A complete justification is made out where it is shown either that the arrest or detention was under a sufficient warrant, or that it was lawful without a warrant.<sup>24</sup> Evidence showing the absence of malice is admissible, not by way of justification, but by way of mitigation or reduction of punitive damages.<sup>25</sup>

§ 108. **Injuries in Family and Personal Relations.** There are certain torts which particularly affect the family relations of parent and child and husband and wife, and the relation of master and servant. These will be more particularly considered in a subsequent chapter in treating of such relations. Thus, as we shall see, a parent may maintain an action for loss of services and expense resulting from a tort, such as an assault and battery or negligence, causing personal injury to his child, or for the seduction of his daughter.<sup>26</sup> In like manner a husband may maintain an action against a third person for wrongful violation of or interference with the personal domestic duties owed him by his wife. Thus, he may sue for personal injuries to his wife resulting in loss of her services and society; and he may maintain an action against one who entices her away, harbors her, or alienates her affections, or who, without his consent, has sexual intercourse with her.<sup>27</sup> And a master may recover for the actual damage he may have suffered by reason of wrongful interference by a third person with his relationship to his servant, by personal injury to the servant, or otherwise depriving the master, in whole or in part, of his services.<sup>28</sup>

§ 109. **Seduction.** Seduction is the act, on the part of a man, of inducing, without the use of force, a woman to commit unlawful

20. 1 Jaggard Torts 417; 19 Cyc. 319.

The restraint must be total, not partial. A man is not imprisoned who has an escape open to him. A mere partial obstruction of his will does not constitute an actionable restraint of his liberty. 1 Jaggard Torts 419; 19 Cyc. 322.

21. 1 Jaggard Torts 417; 19 Cyc. 319, 320.

22. 1 Jaggard Torts 419; 19 Cyc. 322 *et seq.*

23. 1 Jaggard Torts 420; 19 Cyc. 323.

24. 1 Jaggard Torts 424; 3 Cyc. 873 *et seq.*; 19 Cyc. 339 *et seq.*

25. 1 Jaggard Torts 430; 19 Cyc. 319, 320.

26. See *infra*, § 163, f.

27. See *infra*, § 153, g-1.

28. 1 Jaggard Torts 448; *infra*, § 174.

sexual intercourse with him. Seduction is accomplished by persuasion, but without force. If force is used, the act becomes rape.<sup>29</sup> At common law a woman cannot maintain an action for her own seduction,<sup>30</sup> but in many States a right of action is given by statute. In some of the States the seduction must be under promise of marriage and generally the woman must have been of previous chaste character.<sup>31</sup>

§ 110. **Defamation — Slander and Libel.** Defamation is a false publication calculated to bring another into disrepute. As to its objects, it may refer to (1) persons, when it is commonly called libel or slander; or (2) things, when it is commonly called slander of property or title.<sup>32</sup> The latter will be considered in a subsequent section. Publication of defamatory matter consists in communicating it to a third person or third persons. According to the manner of publication, it is either (1) slander, which is defamation of a person by mere talk or words, or what is equivalent thereto, like the signs of a dumb person or gestures; or (2) libel, which is defamation by writing, printing, pictures, emblems, effigies, etc.<sup>33</sup>

To constitute this tort publication is essential. It consists in (1) the giving out of defamatory matter by the defendant; and (2) the taking of it in by a third person or third persons.<sup>34</sup> And to recover for publication of defamatory words, the plaintiff must show (1) their personal application to him; and (2) in a disparaging sense.<sup>35</sup>

Actual damage is sometimes the gist of libel and slander, and sometimes it is not. The rule in actions for slander is that damages will be presumed as a matter of law, without proof of damage in fact, whenever the alleged slanderous matter either (1) imports a charge of punishable crime; (2) imputes a contagious or infectious disease; (3) is calculated to injure the plaintiff in his calling; or (4) tends to the disherison of the plaintiff. But in all other cases damages must be proved; that is, it must be proved that the publication caused the plaintiff some special pecuniary or temporal injury, which must also be sufficient in quantity and proximate. In actions for libel, or written defamation, the general rule is that damages will be presumed only when the matter complained of as libelous is in its nature ordinarily calculated to (1) injure the plaintiff in his calling; or (2) to injure him in

29. See *supra*, 88, b, "Rape."

30. She can maintain an action on contract for breach of promise of marriage and prove seduction in aggravation of damages. See 5 Cyc. 1001, 1021.

31. 1 Jaggard Torts 457; "Seduction," — Cyc. —.

32. 1 Jaggard Torts 473; 25 Cyc. 243 *et seq.*

33. 1 Jaggard Torts 476, 477; 25 Cyc. 243 *et seq.*

34. 1 Jaggard Torts 479; 25 Cyc. 365 *et seq.*

35. 1 Jaggard Torts 484; 25 Cyc. 225 *et seq.*

his social relations; or (3) to subject him to public scandal, scorn, ridicule, or contempt. In all other cases it must be proved that the publication produced special loss or injury to the plaintiff.<sup>36</sup>

Libel and slander are malicious wrongs, but this does not necessarily mean that malice in fact must be proved. In an ordinary action for defamation, spoken or written wrongfully and intentionally, without just cause or excuse, malice is inferred or presumed as a matter of law; but when, on account of the cause of publication, it is *prima facie* excusable, malice in fact must be proved.<sup>37</sup>

Defenses to an action for defamation may be either statutory or common law. Thus, in many jurisdictions there are statutes allowing a public newspaper or other periodical publication, where there was no actual malice, to escape an action by printing a public apology, etc.<sup>38</sup> The common-law defenses peculiar to defamation may operate by way of (1) justification, or (2) mitigation. The alleged defamation may be justified by showing either that the charge was true, or that it was privileged. The truth of the charge is a full justification in a civil action for defamation,<sup>39</sup> although not generally so in a criminal prosecution.<sup>40</sup> Privilege of a communication may be either (1) absolute, when attaching to the position a person holds, or to the document in which it is contained, and such privilege cannot be avoided, even by proof of actual malice; or (2) qualified or conditional, when made with reference to public interest, or in discharge of a duty, which privilege does not attach when malice is shown.<sup>41</sup>

§ 111. *Deceit.* Deceit, for which an action lies at common law, consists of a false statement of a matter of fact by a person knowing its falsity, or recklessly regardless whether it be true or false, to a person who innocently acts upon such statement, and thereby suffers damage. The following elements are usually regarded as essential to this tort: (1) A statement untrue in fact; (2) knowledge or reckless ignorance as to whether it be true or false; (3) intent to deceive a particular person, and to lead that person to act upon the statement; (4) an act done by that person in reliance upon the statement; and (5) damages to that person resulting therefrom.<sup>42</sup> This tort generally arises in connection with con-

36. 1 Jaggard Torts 486, 488, 493; 25 Cyc. 250 *et seq.*

37. 1 Jaggard Torts 512; 25 Cyc. 372.

38. 1 Jaggard Torts 520.

39. 1 Jaggard Torts 521; 25 Cyc. 413.

40. See *supra*, 89, c. p. 120, "Libel."

41. 1 Jaggard Torts 525; 25 Cyc. 375 *et seq.*

42. Smith Elem. L. 278; 20 Cyc. 8. The fraud which gives rise to an action of deceit exists where a person

makes a false representation of a material fact susceptible of knowledge, knowing it to be false, or as of his own knowledge when he does not know whether it is true or false, with intention to induce the person to whom it is made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt; when such person, acting with reasonable prudence, is thereby deceived and induced to so do or refrain, to his damage. 20 Cyc. 10.

tracts, and perhaps particularly in connection with sales; but it is not limited to such cases.<sup>43</sup>

From this it will be seen that whether or not deceit is actionable depends upon the legal aspect of (1) the wrongful conduct of the defendant; (2) the conduct of the plaintiff caused thereby; and (3) the damage resulting therefrom.<sup>44</sup> And the wrongfulness of defendant's conduct depends (1) upon his mental attitude, and (2) upon his consequent act or omission. Defendant's mental attitude is the gist of the wrong.<sup>45</sup> False representations do not amount to fraud and deceit at law, unless they are made with a fraudulent intent. The intent to deceive may be shown in either of three ways, namely, by showing (1) that the party knew his statements to be false; (2) that, having no knowledge as to their truth or falsity, he did not believe them to be true; or (3) that having no knowledge of their truth or falsity, he yet represented them to be true of his own knowledge.<sup>46</sup>

A false representation may consist either in the assertion of a falsehood, or in the suppression of the truth, or both.<sup>47</sup> There must be a representation of *fact*. An action for fraud or deceit does not lie, therefore, in the absence of special circumstances, where the representation complained of consists merely in (1) an expression of opinion; (2) a representation of law; or (3) a promise or representation as to future events.<sup>48</sup>

A false representation has no connection as cause of the damage claimed, unless it actually operated to deceive, and was relied upon, although it need not have been relied upon exclusively.<sup>49</sup> Plaintiff's contributory negligence or credulity in relying on a false representation is ordinarily no defense in an action for the fraud.<sup>50</sup> Fraud may be as effectually perpetrated by acts as by words, and it is settled law that acts or conduct calculated and intended to produce a false impression in the mind of another party are equivalent to actual misrepresentations.<sup>51</sup>

Fraud will not be ground for an action of deceit unless it resulted in damage. "Fraud without damage, or damage without fraud, will not form the basis of an action, but where both concur an action will lie."<sup>52</sup>

§ 112. **Slander of Title or Property.** A person can recover for disparaging words published concerning his title or property whenever he shows (1) that the statement was false; (2) that it

43. See 20 Cyc. 71-80.

44. 1 Jaggard Torts 559; 20 Cyc. 8 39.

et seq.

45. 1 Jaggard Torts 580.

46. 1 Jaggard Torts 561; 20 Cyc. 32.

47. 1 Jaggard Torts 575; 20 Cyc. 42.

48. 1 Jaggard Torts 577; 20 Cyc. 15.

49. 1 Jaggard Torts 600; 20 Cyc. 17, 20, 22.

50. 20 Cyc. 15.

51. 20 Cyc. 15.

52. 1 Jaggard Torts 600; 20 Cyc. 17, 20, 22.

was malicious in fact; and (3) that it has caused him proximate and special pecuniary injury. This tort is called slander of title or property.<sup>53</sup>

§ 113. **Malicious Prosecution.** Malicious prosecution is a wrong to person, estate, or reputation based upon a previous wrongful judicial proceeding. To sustain an action for malicious prosecution there must be a concurrence of the following elements:<sup>54</sup> (1) A civil or criminal judicial proceeding must have been commenced. (2) It must have terminated in favor of the plaintiff in the action for malicious prosecution, except where his success was fraudulent. (3) The plaintiff must have been the defendant in the original proceeding, and the defendant must have been the prosecutor or plaintiff, or the cause of the original proceeding. (4) There must have been absence of any reasonable or probable cause for such proceeding.<sup>55</sup> (5) The proceeding must have been actuated by malice. (6) And it must have resulted in damage to the plaintiff conforming to the legal standard.<sup>56</sup> Want of probable cause and malice must concur to sustain an action for malicious prosecution; but any action or prosecution carried on knowingly, wantonly, or obstinately, or merely for the vexation of the person prosecuted, is malicious.<sup>57</sup>

§ 114. **Malicious Abuse of Process.** An action for damages lies for the malicious abuse of lawful process, civil or criminal, even if such process has been issued for a just cause, and is valid in form, and the proceeding thereon was justified and proper in its inception, where injury arises in consequence of abuse in subsequent proceedings.<sup>58</sup>

53. 1 Jaggard Torts 550; 25 Cyc. 48, 558.

54. 1 Jaggard Torts 602, 603; 26 Cyc. 6 *et seq.*

55. See 1 Jaggard Torts 616; 26 Cyc. 20.

Probable cause, in criminal cases, is such conduct on the part of the accused as may induce the court to infer that the prosecution was undertaken from public motives. Probable cause, in civil actions, is such reasons, supported by facts and circumstances, as will warrant a cautious, reasonable, and prudent man in the honest belief that his action, and the means taken in prosecution of it, are legal, just, and proper. 1 Jaggard Torts 616; 26 Cyc. 24-46.

If a party lays all the facts of his case fairly before a person learned in the law, and acts in good faith on the opinion given him, he can show probable cause, and is not liable to an action for malicious prosecution. 1 Jaggard Torts 621; 26 Cyc. 31, 44.

56. Damages are the gist of an action for malicious prosecution. There can be no recovery unless actual damage, conforming to the standard of the law, is alleged and proved; the right violated is the right not to be harmed. 1 Jaggard Torts 627; 26 Cyc. 60.

57. 1 Jaggard Torts 614, 615.

58. 1 Jaggard Torts 632 [citing *Grainger v. Hill*, 4 Bing. N. Cas. 212, where an officer arrested the owner of a vessel on civil process, and used such process to compel defendant to give up his ship's register, for which damages were recovered, not for maliciously putting the process in force, but for maliciously abusing it]. And see 3 Cyc. 976; "Process," 31 Cyc.

— A common form of abuse of process is excessive attachment. See 1 Jaggard Torts 632; 4 Cyc. 832.

§ 115. **Fraudulent Competition.** No action will lie for damages caused by competition in business unless it is unlawful; but if one resorts to fraudulent or unfair competition, as by colorable imitation, etc., to the damage of another, he is liable. "A man may not benefit himself at the expense of another and a rival trader by passing off his goods or business as being that other's."<sup>59</sup>

§ 116. **Conspiracy.** A conspiracy is an agreement or engagement of persons to coöperate in accomplishing the same unlawful purpose, or some purpose which may not be unlawful by unlawful means.<sup>60</sup> The conspirators are liable to an action for conduct pursuant to such agreement to inflict injury, as in case of a conspiracy to defraud, to commit a trespass, to injure another in his business, property, or calling, etc. The injury done, and not the conspiring, however, is the gist of the action, and therefore there must be some overt act consequent upon the agreement, and resulting in damage, in order that an action may be maintained.<sup>61</sup> In this respect conspiracy as a tort differs from conspiracy as a crime, for, as we have seen, the mere conspiracy, without any overt act, is ground for a criminal prosecution.<sup>62</sup> The essential elements of strikes and boycotts actionable as torts are: (1) A combination of persons to do harm to another; (2) malicious intent; and (3) damage to the plaintiff.<sup>63</sup>

§ 117. **Malicious Interference with Contract.** By malicious interference with contract is meant the inducing of one person to break his contract with another, in order to injure that other, or to gain some advantage at his expense. The essence of this wrong lies in the malicious intent.<sup>64</sup> Actions to recover damages for malicious interference with a contract have been generally recognized in England, and also in a number of cases in the United States. To sustain such an action it is necessary that there shall have been: (1) A contract; (2) knowledge of the contract on the part of the defendant; (3) malice on the part of the defendant; and (4) damage suffered by the plaintiff.<sup>65</sup> If the interference

59. Pollock Torts 150. And see 1 Jaggard Torts 146; "Trade-Marks and Trade-Names," — Cyc. —.

Underselling, although at a manifest loss, is not of itself unfair competition. Pollock Torts 307.

60. 1 Jaggard Torts 637; 8 Cyc. 620.

61. 1 Jaggard Torts 637, 638; 8 Cyc. 645.

62. See *supra*, § 88, c, "Conspiracy."

Conspiracy as a tort should be distinguished from conspiracy as a crime. While criminal conspiracy can exist independent of any act in execution

of the unlawful purpose, conspiracy as a tort can hardly be said to exist until the unlawful object is fully or partially accomplished. Civil conspiracy usually becomes important because of its tendency to aggravate the damages recoverable, or to render persons liable who participated in the unlawful combination, although they took no part in the substantive wrongful act. Smith Elem. L. 274.

63. 1 Jaggard Torts 641; 8 Cyc. 650-656.

64. Smith Elem. L. 279.

65. 1 Jaggard Torts 634; "Torts," — Cyc. —.



is used for the purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, the conduct is malicious.<sup>66</sup>

§ 118. **Trespass.** Trespass, in its widest legal sense, includes any wrong to the person or property of another committed with force. In its narrower sense, however, it includes only forcible violations of rights in corporeal property.<sup>67</sup> The common law recognized an absolute duty to respect the property of others, but based its remedies for the violation of such duties upon possession rather than on ownership.<sup>68</sup> Trespass is the wrongful disturbance of another's possession of lands or goods. The disturbance may consist of physical entry on lands, or seizure of goods, or of any other exercise of ownership or control over them inconsistent with the owner's possession.<sup>69</sup> If goods are taken and carried away, a trespass is committed for which an action of "*trespass de bonis asportatis*"<sup>70</sup> will lie. For a forcible destruction of or injury to either real or personal property, or for an assault and battery, an action called "*trespass vi et armis*"<sup>71</sup> may be maintained. For an unlawful entry upon the land of another the remedy is an action of "*trespass quare clausum fregit*."<sup>72</sup> These different forms of action typify different forms of the wrong.<sup>73</sup>

Forcible disturbance of peaceable possession is a trespass; but force as an essential element of disturbance may not be violence; nor need it be actual force, in the popular sense of the term; it may be implied. The mere walking over another's land is sufficient.<sup>74</sup> If a man's land is not surrounded by any actual fence the law encircles it with an imaginary inclosure, to pass which is to break and enter his close and commit a trespass.<sup>75</sup> To show a disturbance of possession, it is not necessary to prove actual damages. Every invasion of property, be it ever so minute, constitutes a trespass, the gist of the action being disturbance of possession.<sup>76</sup>

To maintain trespass, it is absolutely necessary that the plaintiff shall have been in actual possession, or that he shall have had

66. 1 Jaggard Torts 635.

67. It is common to refer to forcible injuries to the person as trespasses to the person. But such wrongs have been differentiated from "trespass" as the term is properly used, and are called by the distinct names "assault and battery" and "false imprisonment." Smith Elem. L. 277. These have already been considered. See *supra*, §§ 106, 107.

68. 2 Jaggard Torts 653.

69. 2 Jaggard Torts 660; "Trespass," — Cyc. —.

70. Meaning "trespass for goods taken or carried away."

71. Meaning "trespass with force and arms."

72. Meaning "wherefore he broke the close."

73. Smith Elem. L. 277; "Trespass," — Cyc. —.

74. 2 Jaggard Torts 660.

75. 2 Jaggard Torts 660.

76. 2 Jaggard Torts 662; "Trespass," — Cyc. —.

the right to take possession at the time of the trespass. A person out of possession of land actually occupied by another cannot succeed in trespass until he has first ousted the possessor and put himself into possession. Nor can the owner maintain trespass for taking personal property unless, at the time of taking, he had possession or the right to take actual possession.<sup>77</sup> Constructive possession is either the possession of an agent or servant, or an immediate right to possession, or possession conferred by law in certain cases, independently of any physical apprehension or transfer.<sup>78</sup>

What would otherwise be a trespass may be justified by circumstances. Justification of a trespass may be: (1) Authority of law in the form of (a) legal process, civil or criminal; or (b) otherwise, as abatement of nuisance, distress, necessity, or private defense; (2) consent of the owner or possessor, which may be (a) express or implied; (b) revocable or irrevocable; (3) property in defendant, which may be (a) an estate in fee, or less estate; or (b) special property, like easements.<sup>79</sup>

The fact that a disturbance of property or possession was involuntary and by mistake is no defense if the physical act was voluntary. Thus, where one person, in mowing his grass, mowed by mistake a little of his neighbor's, which was growing alongside, he was held liable. If, however, the act is involuntary it is otherwise. Thus, if a man who is assaulted and in danger of his life runs through the close of another, without keeping in a footpath, an action for trespass does not lie.<sup>80</sup>

§ 119. **Conversion.** Conversion is an unauthorized act which deprives another of his property, permanently, or for an indefinite time; and for this an action called "trover" lies at common law.<sup>81</sup> This action, as the term "trover" implies, was, according to the original form of declaration, applicable only to cases where the plaintiff had lost his goods and they were subsequently found and appropriated by the defendant; but even under common-law practice and pleading, the averments of loss and finding have long been considered immaterial, and are not traversible by the defendant.<sup>82</sup> Trespass and trover, while distinct forms of action, may in many instances lie for the same wrong, at the plaintiff's option.<sup>83</sup> To entitle one to recover in trover and conversion, he or his assignor must have had at the time of the alleged wrong: (1) Property, general or special, entitling him to immediate possession; or (2) actual possession.<sup>84</sup>

77. 2 Jaggard Torts 664.

78. 2 Jaggard Torts 672.

79. 2 Jaggard Torts 673; "Trespass," — Cyc. —.

80. 2 Jaggard Torts 653, 654.

81. 2 Jaggard Torts 706; "Trover and Conversion," — Cyc. —.

82. 2 Jaggard Torts 706. See *supra*, § 31.

83. 2 Jaggard Torts 707, 708.

84. 2 Jaggard Torts 710; "Trover and Conversion," — Cyc. —.

An act of conversion is the distinct, unauthorized, and positive assumption of the powers of a true owner. Every distinct act of dominion exerted over property in denial of the owner's right, or inconsistent therewith, amounts to conversion. Neither the benefit to defendant resulting from the act, nor ordinarily the motive inducing it, but the loss to the plaintiff, is the basis of the wrong.<sup>85</sup> An act of conversion is committed when one of the following circumstances exists, or more than one concur: (1) When the property is wrongfully taken; (2) when it is wrongfully parted with; (3) when it is wrongfully retained; or (4) when it is wrongfully destroyed.<sup>86</sup>

§ 120. **Waste.** Waste is an injury done or permitted by the owner of the present estate in land which tends to destroy or lessen the value of the inheritance.<sup>87</sup> Waste, however intimately allied with, is a wrong distinct from trespass and from conversion. It pertains to land only, but trespass may apply to land and personalty; conversion, only to personalty. In both trespass and conversion, the remedy is based on possession or right of possession; while in waste the wrong is inflicted by the person in possession.<sup>88</sup> The substance of waste is the unauthorized wrong to the inheritance, either in the sense of the value or in the sense of destroying the identity.<sup>89</sup>

In kind waste may be permissive or commissive. Permissive waste is merely passive conduct. Commissive waste is the doing of a wilful injury to the premises concerned. Allowing a house to go to ruin by reason of non-repair is permissive waste. Commissive waste, as to land, may consist in the removing of virgin soil, wrongfully cutting timber, diversion of the course of a stream, destruction of game, fish ponds, and the like.<sup>90</sup>

§ 121. **Violation of Easements.** An easement is violated or disturbed when anything is done which prevents its full enjoyment. The violation of an easement is usually a wrong in the nature of a trespass; but trespass properly includes injuries to corporeal property only.<sup>91</sup>

§ 122. **Infringement.** Infringement is a violation of the rights secured by a patent, a copyright, or a trade-mark, and an action of

85. 2 Jaggard Torts 716, 717.

86. 2 Jaggard Torts 722; "Trover and Conversion," — Cyc. —.

87. 2 Jaggard Torts 695; "Waste," — Cyc. —.

"Waste is any unauthorized act of a tenant of a freehold estate not of inheritance, or of any lesser interest, which tends to the destruction of the tenement, or otherwise to the injury of the inheritance." Pollock Torts 285.

88. 2 Jaggard Torts 696.

89. 2 Jaggard Torts 697; "Waste," — Cyc. —.

"Whatever does a lasting damage to the freehold or inheritance is waste." 2 Blackstone Comm. 281.

90. 2 Jaggard Torts 697, 699.

91. Smith Elem. L. 278; 14 Cyc. 1216.

As to what are easements see *infra*, § 191.

tort will lie therefor. Thus, an unauthorized manufacture or sale of a patented article is an infringement of patent;<sup>92</sup> an unauthorized publication of a copyrighted literary production is an infringement of copyright;<sup>93</sup> while an unauthorized use of a trade-mark is an infringement of the trade-mark.<sup>94</sup>

§ 123. **Nuisance.** Nuisance is a distinct civil wrong consisting of anything wrongfully done or permitted which interferes with or annoys another in the enjoyment of his legal rights.<sup>95</sup> It is such a use of one's own person or property as to substantially violate the rights of another. It is a violation of rights growing out of the maxim: "*Sic utere tuo ut alienum non lædas.*"<sup>96</sup> Every man may use his own in his own way so long as he does not encroach upon his neighbor's rights. Consequently, actual injury to the plaintiff is an essential element of this wrong.<sup>97</sup>

The legal rights with which a nuisance interferes may concern property, corporeal or incorporeal, or personal enjoyment of health and comfort.<sup>98</sup> Thus, if one erects a smelting-house so near the house of another that the vapor and smoke kill his corn and grass, damage his cattle or injure his trees, this is a nuisance.<sup>99</sup> Overhanging eaves from which water flows on another's premises constitute a nuisance.<sup>1</sup> At common law, depriving a neighbor of the subjacent or adjacent support necessary to sustain his land in its natural and unencumbered state, by use of one's own land, to the neighbor's damage, is an actionable wrong.<sup>2</sup> Every proprietor has a right to the continued flow of a natural stream running through his land, and to the use of its water to a reasonable extent, but he may not accumulate it so as to overflow lands above him, nor seriously lessen the quantity of water which would naturally descend, nor defile it so as to render it unfit for use.<sup>3</sup>

It is not essential, however, to constitute a nuisance, that the injury should be to property. The scope of nuisance has been widened so far as to clearly include such use of property or conduct of a person as renders the enjoyment of life uncomfortable, or is indecent or offensive to the senses. Thus, noise may be so continuous and excessive, or vapors or noxious smells render the enjoyment of life and property so uncomfortable, as to be a

92. See 30 Cyc. 802.

93. See 9 Cyc. 889.

94. Smith Elem. L. 278; "Trade-Marks and Trade-Names," — Cyc. —.

95. 2 Jaggard Torts 744; Cooley Torts § 365; 1 Cyc. 769; 29 Cyc. 1152, 1254.

96. Meaning "Use your own property in such a manner as not to injure that of another."

97. Smith Elem. L. 274.

98. 2 Jaggard Torts 748; 29 Cyc. 1156 *et seq.*

99. 2 Jaggard Torts 748; 29 Cyc. 1181, 1195.

1. 2 Jaggard Torts 749; 29 Cyc. 1178.

2. 2 Jaggard Torts 751; 1 Cyc. 775, 790.

3. 2 Jaggard Torts 753; 29 Cyc. 1177, 1178; "Waters," — Cyc. —.

nuisance; and clearly the maintenance of anything injurious to health may be a nuisance.<sup>4</sup>

The interference with legal rights, which constitute a nuisance, does not depend, ordinarily, either upon the care exercised by the wrong-doer or upon his motive.<sup>5</sup> But annoyance, to constitute a nuisance, must cause substantial damage; for damages are the gist of the wrong, unless there is a physical invasion, or interference with, another's property, in which case the presence or absence of actual damage is immaterial. The creating or continuing of a nuisance in any form which involves the physical invasion or interference with another's property is a wrong for which at least nominal damages may be recovered.<sup>6</sup>

Where the law has authorized the conduct complained of, which would otherwise be a nuisance, and no constitutional provision is violated by the law, there can be no proper interference therewith, either by the act of the party or by judicial proceeding.<sup>7</sup>

Private remedies for a nuisance not merely statutory may be: (1) Abatement by act of parties or by judicial proceeding; (2) injunction or other equitable remedies; or (3) an action for damages.<sup>8</sup> The abatement of a nuisance by private persons is one of the oldest recognized remedies for torts. It is, in general, the removal of the nuisance. Where a party can maintain an action for a nuisance, whether public or private, he may enter and abate it, without breach of the peace, unless the nuisance consists of unlawful and immoral conduct.<sup>9</sup>

§ 124. **Negligence.** Negligence, as a tort for which an action for damages will lie, is the inadvertent omission to use that care and diligence which it is a person's legal duty to use, proximately causing injury to another.<sup>10</sup> If the injury is intentional, it is something more than mere negligence. Negligence is a breach of the duty to use the care required under the particular circumstances. But it will not amount to a tort unless the breach results in damage to the plaintiff.<sup>11</sup> The essential elements of negligence are: (1) Failure to exercise commensurate care, involving (2) a breach of duty, resulting in (3) damage to the plaintiff.<sup>12</sup> The

4. 2 Jaggard Torts 767; 29 Cyc. 1105 *et seq.*, 1184 *et seq.*

5. 2 Jaggard Torts 771; 29 Cyc. 1154, 1155.

6. 2 Jaggard Torts 778; 29 Cyc. 1154, 1190, 1193, 1277.

7. 2 Jaggard Torts 788; 29 Cyc. 1197.

8. 2 Jaggard Torts 799; 29 Cyc. 1214 *et seq.*

9. 2 Jaggard Torts 799; 29 Cyc. 1214, 1215.

Thus, trees whose branches and roots extend over into the land of

another are nuisances, to the extent that the branches overhang and the roots penetrate the other's land, and the person whose land is injured may cut off the roots and branches so far as they overhang or penetrate, but he may not cut down the trees. 2 Jaggard Torts 800; 1 Cyc. 772, 791; 29 Cyc. 1215.

10. Smith Elem. L. 273; 29 Cyc. 415 *et seq.*

11. Smith Elem. L. 274; 29 Cyc. 415 *et seq.*

12. 2 Jaggard Torts 810.

duty, violation of which gives rise to a cause of action in negligence, is to exercise due care under the circumstances. Mere carelessness, resulting in harm to another, is not actionable unless thereby there be violated a duty by the wrong-doer to the sufferer prescribed by the common law, by contract, or by statute.<sup>13</sup>

The owner or occupier of real estate owes certain duties to those who come thereon, according to the cause of their entry, and the nature of the danger to which they are exposed. (1) To trespassers it is only against active injury; (2) to licensees it is to give notice of hidden dangers or properties; (3) while to invited persons, as that term is understood by the law, the owner is bound to use reasonable care, having respect to the person and character of the business to be carried on, to save his guest from injury while upon the premises.<sup>14</sup>

To maintain successfully an action for negligence, the ordinary rule is that it must appear that the injury was occasioned by actionable negligence on the defendant's part, and it must not appear that there was contributory negligence on the plaintiff's part. But contributory negligence is no defense to a wilful or wanton wrong.<sup>15</sup> To make out the defense of contributory negligence the plaintiff's conduct must have the three essential elements of negligence, that is: (1) A duty to exercise care; (2) a violation of that duty in fact; and (3) connection as cause of the damage complained of.<sup>16</sup> The duty of exercising care to avoid injuries includes, *inter alia*: (1) The duty of not voluntarily exposing one's person or property to harm; (2) and the duty of avoiding harm before or after the damage is done, when voluntary and deliberate action is allowed by the circumstances. But the duty of exercising care does not require one to anticipate a wrongful act.<sup>17</sup> In order that the plaintiff's contributory negligence may bar his recovery, it must be connected as at least a part of the legal cause of the damage.<sup>18</sup> There may be a recovery, notwithstanding mutual negligence on the part of the plaintiff and the defendant: (1) If the injury would have happened although the plaintiff had been in no wise negligent; or (2) if the defendant, after he discovered the danger to which the plaintiff was exposed by his own negligence, refused or neglected to exercise due care, under the circumstances, to avoid harm.<sup>19</sup>

§ 125. **Action for Death by Wrongful Act.** At common law the right of action for an injury to the person abates upon the death

13. 2 Jaggard Torts 825; 29 Cyc. 415 *et seq.*

14. 2 Jaggard Torts 989 [quoting 34 Am. L. Reg. & Rev. 197]; 29 Cyc. 442, 445, 449, 453, 465, 471.

15. 2 Jaggard Torts 959; 29 Cyc. 505 *et seq.*

16. 2 Jaggard Torts 962.

17. 2 Jaggard Torts 962.

18. 2 Jaggard Torts 971.

19. 2 Jaggard Torts 971.

of the party injured, the case falling within the maxim, "*Actio personalis moritur cum persona*";<sup>20</sup> and therefore where death results, whether instantaneously or not, from such an injury, no action can be maintained by the personal representative, heirs, or distributees, of the party injured to recover damages suffered by the decedent.<sup>21</sup> But where the death of a wife or child, caused by wrongful act, is not instantaneous, the husband or father may recover for the loss of services and for medical and other expenses up to the time of death.<sup>22</sup> A right of action to recover damages for death caused by wrongful act was given in England by a statute known as Lord Campbell's Act,<sup>23</sup> and this statute has been, with various modifications, incorporated in the legislation of most, if not all, of the States in this country. Under these statutes, whenever the death of a person is caused by any wrongful act or neglect, the party who would have been liable if death had not ensued is liable to an action for damages, notwithstanding the death of the party injured.<sup>24</sup>

20. Meaning "A personal right of action dies with the person."

21. Tiffany Death by Wrongful Act, § 1; 13 Cyc. 310.

22. See 13 Cyc. 310, 311; Tiffany Death by Wrongful Act, § 1.

23. 9 & 10 Vict. c. 93.

24. See 13 Cyc. 311 *et seq.*

## CHAPTER XI

### CONTRACTS

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### A. GENERAL PRINCIPLES

§ 126. Definition and Essential Elements.— A contract, in its proper sense as an executory contract, is an agreement the fulfilment of whose promises is enforceable in law.<sup>1</sup> It is the result of the concurrence of agreement and obligation, and may therefore be defined as “an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.”<sup>2</sup>

We have seen that every subject owes certain duties to the state, being obliged to obey the laws when those laws are properly laid down by competent governmental authority. The ground of this obligation is that such obedience is necessary to the fulfilment of the functions of the state, and therefore necessary to the welfare of society. By virtue of these obligations the subject is restricted in his freedom of action. He is obliged, for example, to pay taxes,

1. Smith Elem. L. 225.

2. Clark Contr. (2d ed.) 2; 9 Cyc.  
240.



and to refrain from the commission of crimes. The distinguishing feature of these restrictions is that they are imposed by law.<sup>3</sup> In addition to the restrictions thus imposed, the subject is able to bind himself by certain acts toward, or agreements with, his fellow subjects. If, for example, he should assault his neighbor, seriously injuring him, he might be obliged to compensate his neighbor therefor; and thus a relation somewhat similar to that of debtor and creditor would result, although of different origin, being based, as we have seen, upon tort. But if he should purchase his neighbor's horse, and promise to pay for it on a certain day, the true relation of debtor and creditor would exist between them. The subject may, therefore, be a party to two sorts of relations, one resulting in a control exerted by the state over him, based upon the necessity of government in every community; the other involving a control exercised by him over one or more of his fellow subjects growing out of agreement (*ex contractu*) or out of wrongful act (*ex delicto*). The relations arising from the perpetration of wrongful acts toward other subjects, and the obligation arising therefrom, form the subject-matter of the law of torts, which has already been discussed. When two or more persons enter into a legal relation by agreement, the law will enforce the fulfilment of the promises involved in such agreement, and the agreement itself is called a contract.<sup>4</sup>

It is obvious that there may be agreements the obligation of whose promises is of a moral or social nature merely; as when a person agrees to dine with his friend on a certain day. There are, on the other hand, rights which are enforceable at law, which do not originate in agreement, as those growing out of torts. But it is only when the two elements, agreement and enforceability at law or obligation are both present that a contract exists.<sup>5</sup>

There must be an agreement directly contemplating and resulting in an obligation enforceable in law, and therefore: (1) There must be a distinct communication by the parties to one another of their intention, or an offer and acceptance; (2) the agreement must possess the marks which the law requires in order that it may affect the legal relations of the parties and be an act in the law; and therefore it must be in the form required by law, and there must be a consideration when this is required by law, as will be shown in another section; (3) the parties must be capable in law of making a valid contract; (4) the consent expressed in offer and acceptance must be genuine; and (5) the objects which the contract proposes to effect must be legal.<sup>6</sup> These essentials of a valid contract will be shortly considered in the following sections.

3. Smith Elem. L. 225.

(2d ed.) 2 et seq.; 9 Cyc. 240 et

4. Smith Elem. L. 225, 226.

seq.

5. Smith Elem. L. 227; Clark Contr.

6. Clark Contr. (2d ed.) 12.

§ 127. **The Agreement — Offer and Acceptance.**— Agreement is absolutely essential to the creation of every true contract. An agreement may be defined as the communication by two or more persons to each other, on the one hand of one or more promises to do or refrain from doing something, and on the other of a willingness to rely on the promises so made;<sup>7</sup> or, to put it in another way, it is the expression by two or more persons, either by words or by conduct, of a common intention to affect the legal relations of those persons. There must be a meeting of minds in one and the same intention.<sup>8</sup>

The idea of an agreement involves: (1) Two or more parties naturally competent to enter into it; (2) mutual assent; (3) communication to each other of the mutual assent; and it is further necessary (4) that the subject-matter with reference to which they agree shall be the doing or not doing of some act or acts; or in other words, it must be something more than concurrence in a mere abstract proposition.<sup>9</sup>

*Natural Competency of Parties.*— It is sufficient for our purposes to refer the term "agreement" to the Latin phrase "*aggregatio mentium*," or "meeting of the minds." As it would be impossible to conceive of such a meeting without the participation of at least two sane minds, it follows that no agreement can take place without two or more parties capable of giving an intelligent assent. It follows also that drunkenness, insanity, or any mental condition in which common intelligence is absent renders a person naturally incompetent to become a party to an agreement of any kind so long as the disability continues.<sup>10</sup>

*Offer and Acceptance.*— To constitute a contract, the expression of common intention must generally, if not always, arise from an offer made by one party to another, and an acceptance of the offer by the latter, with the result that one or both are bound by a promise. The offer may be (1) of a promise, or (2) of an act. The acceptance may be (1) by simple assent in the case of contracts under seal, where no consideration is necessary, or (2) by the giving of a promise, or (3) by the doing of an act. For example, the presence of a public conveyance on the street is a constant offer by the proprietor to carry persons, and when a person steps into the conveyance he accepts the offer, and promises to pay the fare. This is an offer of an act for a promise. If a person who has lost property offers by advertisement a reward to any person who shall return it, he offers a promise for an act, and when a person returns the property he accepts and performs the act, and the promise be-

7. Smith Elem. L. 227.

10. Smith Elem. L. 228. See also

8. Clark Contr. (2d ed.) 2; 9 Cyc. *infra*, § 131.

244.

9. Smith Elem. L. 227. And see *infra*, this section.

comes binding. If a person offers another to pay him a certain sum on a future day if the latter will promise to perform certain services for him before that day, or *vice versa*, he offers a promise for a promise, and where the person to whom the offer is made accepts it by promising to perform the service or to pay, as the case may be, both parties are bound, the one to do the work and the other to make the payment. This is the offer of a promise for a promise.<sup>11</sup>

*Mutual Assent — Acceptance of Offer.*— The parties must not only be capable of an intelligent assent, but they must actually give their assent; and the assent of both must be to precisely the same thing, and at the same instant of time. Consequently, if one assents to a certain thing, and the other assents to it only with modifications; or if one assents to it at one time and the other at a different time, no agreement or contract arises therefrom.<sup>12</sup> From this it is clear that an offer must be accepted before it can become a binding promise. This rule springs from the very nature of contract as involving the element of agreement.<sup>13</sup>

*Communication of Offer and Acceptance.*— Manifestly there can be no agreement until the mutual assent is communicated between the parties, or put in a way to be communicated. It is plain, for example, that without communication of the offer there can be no agreement. Thus, in the case of an offer of a promise for an act, if the offeree does the act in ignorance of the offer, he is not entitled to the benefit of the promise.<sup>14</sup> If an offer contains on its face the terms of a complete contract, the acceptor will not be bound by any other terms intended to be included, unless he knew those terms, or had their existence brought to his knowledge, and was capable of informing himself of their nature.<sup>15</sup>

It is also said that the acceptance must be communicated, but this is true in a restricted sense only. The rules on this subject may be stated thus: Where the offer contemplates the performance of or forbearance from an act as the consideration of the promise of the offerer, the performance or forbearance is an acceptance, unless the offerer expressly or impliedly prescribes that the acceptance must be communicated.<sup>16</sup> Where the offer contemplates a promise as the consideration of the promise of the offerer, communication of the acceptance is essential, unless the offer contemplates that the performance of some overt act manifesting an intention to accept shall

11. Clark Contr. (2d ed.) 13, 14; 9 Cyc. 247, 256.

12. Smith Elem. L. 228; 9 Cyc. 245 *et seq.* And see *infra*, this section.

13. Clark Contr. (2d ed.) 21; 9 Cyc. 254.

14. Clark Contr. (2d ed.) 18; 9 Cyc. 252, 254.

15. Clark Contr. (2d ed.) 19; 9 Cyc. 262.

16. Clark Contr. (2d ed.) 22; 9 Cyc. 270.

be an acceptance, in which case performance of the act is an acceptance.<sup>17</sup> Where the offer contemplates the despatch of an acceptance by means beyond the acceptor's control, as by the mail or telegraph, or by the offerer's messenger, an acceptance so despatched is effective from the time of despatch, unless the offerer makes the formation of the contract dependent upon actual communication to himself; and the contract, being complete on despatch of the acceptance, is binding notwithstanding the acceptance is lost and does not reach the offerer.<sup>18</sup>

From what has just been said it will be seen that, while the assent of both parties must be at the same instant of time, it is not necessary that the communication shall be simultaneous. This would often be impracticable. As a rule the law requires communications to be made within a reasonable time of each other, and what is to be regarded as a reasonable time depends upon the circumstances of the particular case. Communication may be either by written or spoken words, or by conduct, or partly by one and partly by the other.<sup>19</sup>

*Communication by Conduct.*— From what has already been said as to the possible forms of offer and acceptance, it will have been seen that conduct may take the place of written or spoken words in the making of contracts. If a person asks another to perform service for him for compensation, the latter may generally accept the offer simply by performing the service. His acceptance is inferred or implied from his conduct. Again, if a person allows another to work for him under such circumstances that no reasonable man would suppose that the latter means to do the work for nothing, he will be liable to pay for it. The doing of the work is an offer; the permission to do it, or acquiescence in its being done, is the acceptance. The offer and acceptance are implied from the circumstances. Contracts thus formed are called implied contracts.<sup>20</sup>

*Character, Time, Place, and Mode of Acceptance.*— The acceptance of an offer, to result in a contract, must be: (1) Absolute and unconditional; (2) identical with the terms of the offer; and (3) in the mode, at the place, and within the time expressly or impliedly required by the offer.<sup>21</sup> If a person offers to do a definite thing, and the person to whom the offer is made accepts conditionally, or introduces a new term into the acceptance, his answer is not an acceptance; but it is either a mere expression of willingness to

17. Clark Contr. (2d ed.) 22; 9 Cyc. 271.

18. Clark Contr. (2d ed.) 22, 26; 9 Cyc. 295.

19. Smith Elem. L. 228; 9 Cyc. 252, 270.

20. See Clark Contr. (2d ed.) 15; 9 Cyc. 247 *et seq.* And see *infra*, § 128, "Express and Implied Contracts."

21. Clark Contr. (2d ed.) 27; 9 Cyc. 265 *et seq.*

treat, or it is in effect a counter offer, which must be accepted or assented to before a contract can result.<sup>22</sup>

It is also essential that the acceptance shall be made in the manner, at the place, and within the time expressly or impliedly designated in the offer. The proposer has the right to dictate terms in respect to the time, place, and manner of acceptance; and when he does so, like other terms, they must be complied with.<sup>23</sup>

*Revocation of Offer.*—Since an unaccepted offer creates no rights, it follows that it may be revoked at any time before acceptance, so that a subsequent acceptance will be inoperative.<sup>24</sup> An offer, although coupled with a promise to hold it open for acceptance for a specified time, may nevertheless be revoked or withdrawn before the time has expired, provided there is no consideration for the promise to hold the offer open. Cases of this kind arise where a person gives another an "option," or the "refusal" of land or goods for a certain time.<sup>25</sup>

It is necessary, however, that notice of revocation shall be communicated, to prevent an acceptance from being effective. As we have seen, acceptance may take effect at the moment it is despatched. A revocation, on the contrary, is not effective until the moment it is received. A person, therefore, who has accepted an offer not known by him to have been revoked, may safely act on the footing that the offer and acceptance constitute a contract binding on both parties. A person who has received an offer by mail or telegraph, and mailed or telegraphed his acceptance, has thereby created a binding contract, although notice of revocation of the offer has been mailed or wired to him before his acceptance.<sup>26</sup>

*Lapse of Offer.*—An offer will lapse, and so be determined without express revocation, so that a subsequent acceptance will have no effect: (1) On the efflux of a time specified for acceptance, or of a reasonable time when no time is specified; (2) on its rejection;<sup>27</sup>

22. Clark Contr. (2d ed.) 28; 9 Cyc. 287.

Thus, an offer to sell a specified quantity of goods cannot be made binding on the proposer by ordering a less quantity, for there is no offer to sell any quantity greater or less than that specified. And the same is true where the offer is to sell a certain quantity each of several articles, and the person to whom the offer is made orders the specified quantity of one or more of them but declines the others. Nor will an order of a certain quantity of goods, accepted by sending a less quantity, impose any liability for the goods sent. Clark Contr. (2d ed.) 29.

23. Clark Contr. (2d ed.) 30; 9 Cyc. 265, 266.

24. Clark Contr. (2d ed.) 31; 9 Cyc. 283.

At common law this rule does not apply to an offer under seal. Clark Contr. (2d ed.) 32; 9 Cyc. 287.

25. Clark Contr. (2d ed.) 33; 9 Cyc. 285.

26. Clark Contr. (2d ed.) 33, 34; 9 Cyc. 288, 296.

27. The rejection or refusal of an offer by the person to whom it is made causes the offer to lapse. In order that an acceptance may be effective after a refusal, the offer must have been renewed by the proposer. Clark Contr. (2d ed.) 36; 9 Cyc. 290.

(3) on failure of the acceptance to comply with the terms of the offer, which is equivalent to a rejection;<sup>28</sup> or (4) on the death or insanity of either party before acceptance.<sup>29</sup>

*Offer to the Public Generally.*—An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person. Take, for instance, the case of a proposal by way of advertisement of a reward for the rendering of certain services, addressed to the public at large, such as an advertisement for the return of lost property, or for the apprehension of persons who have committed a crime, or for certain information. This is an offer, to any one who shall accept it, of a promise for an act, and becomes a binding promise to pay the reward as soon as any individual renders the services.<sup>30</sup>

*Offer as Referring to Legal Relations.*—In order that an offer or proposal may be turned into a binding contract by acceptance, it must be made in contemplation of legal consequences. A mere statement of intention, for instance, made in the course of conversation, without contemplating a contract, will not result in a binding promise, although acted upon by the party to whom it is made.<sup>31</sup> On the same footing stand engagements of pleasure, or agreements, which, from their nature, do not admit of being regarded as business transactions, such as social engagements, and the like.<sup>32</sup> Transactions intended as a joke or jest cannot result in a contract, for the reason that there is no intention to contract.<sup>33</sup> So also offers, which, by acceptance, may be turned into binding promises, must be distinguished from offers which merely amount to invitations to deal, as where merchants send out circulars offering goods for sale on certain terms, not intending the circular as an offer to become binding on acceptance, but merely as an invitation to persons to enter into negotiations; or where a person wishing to have work done, or to buy goods, advertises for bids or proposals. In these cases, as legal consequences are not directly contemplated, no contract relation arises with persons who may send an order for goods or make bids or proposals, unless they are accepted.<sup>34</sup> Similar to such cases are those in which the parties are carrying on negotiations,

28. A failure to comply with a condition of the offer as to the mode of acceptance, or an acceptance conditionally, or on terms varying from those offered, will cause the offer to lapse, for this is, in effect, a rejection of the offer. Clark Contr. (2d ed.) 36; 9 Cyc. 290.

29. Clark Contr. (2d ed.) 36; 9 Cyc. 290 *et seq.*

30. Clark Contr. (2d ed.) 38; 9 Cyc. 255; "Rewards," — Cyc. —.

31. Clark Contr. (2d ed.) 40; 9 Cyc. 276.

32. Clark Contr. (2d ed.) 41; 9 Cyc. 275.

33. Clark Contr. (2d ed.) 41; 9 Cyc. 276.

34. Clark Contr. (2d ed.) 41; 9 Cyc. 278, 279.

and have not yet come to an agreement. So long as the negotiations are incomplete, there is no contract.<sup>35</sup>

An offer or proposal must also be capable of creating legal relations, or no contract can result; and an agreement cannot create an obligation, or legal relations, unless it is capable of being enforced by the courts. It follows that, to result in a contract, the agreement must be sufficiently definite and certain to enable the court to collect from it the full intention of the parties, for the court cannot make an agreement for them.<sup>36</sup>

§ 128. *Classification of Contracts.* There are three different classifications of contracts recognized by the courts, the first based upon the character of the promises as to time of performance, whether present or future; the second having for its basis the form in which the contract is expressed; and the third depending upon the mode of proof.<sup>37</sup>

*Executed and Executory Contracts.*—As to the present or future performance of their promises, contracts are either executed or executory. An executed contract is one the promises of which are wholly performed. An executory contract is one where something yet remains to be done. If one party has fulfilled his promise, while the other has not, the contract is said to be executed as to one and executory as to the other.<sup>38</sup>

*As to Form.*—As to form, contracts are divided into: (1) Contracts which are dependent for their validity upon their form alone, or strictly formal contracts; which are (a) contracts of record, and (b) contracts under seal; (2) simple or parol contracts, which may be divided into (a) such as are dependent for their validity both on their form and on the presence of consideration, such contracts being those not under seal, nor of record, but which are required by law to be in writing, either with or without a particular form; and (b) such as are dependent for their validity upon the presence of consideration alone, no form at all being required.<sup>39</sup>

The obligations which are called "contracts of record" are: (1) Judgments of courts of record, whether entered by consent or *in invitum*; although in the latter case the obligation is quasi-contractual, and not contractual in the true sense;<sup>40</sup> (2) recognizances, which are obligations, entered into before a court of record, to do or forbear from doing a certain thing under a penalty, as for instance, to appear at court as a witness or for trial, to keep the peace, or to pay a debt.<sup>41</sup>

35. Clark Contr. (2d ed.) 42; 9 Cyc. 280.

36. Clark Contr. (2d ed.) 43; 9 Cyc. 248.

37. Smith Elem. L. 231.

38. Smith Elem. L. 232; 9 Cyc. 244.

39. Clark Contr. (2d ed.) 47.

40. Clark Contr. (2d ed.) 49. See 23 Cyc. 1505. As to meaning of quasi-contract see *infra*, § 138.

41. Clark Contr. (2d ed.) 49, 50; "Recognizances," — Cyc. —.

Contracts under seal, otherwise called "deeds" or "specialties," derive their validity, at common law, from their form alone, and not from the fact of agreement or consideration. The term "deed" is popularly used as meaning conveyances of land, but in law it also includes a bond, power of attorney, or any contract under seal. To be valid, a deed must be in writing, and must be sealed and delivered, and possibly signed. It takes effect from the date of its delivery.<sup>42</sup> The chief characteristics of a deed or contract under seal are that: (1) The recitals are conclusive against the parties. They are said to be estopped thereby. (2) It merges and extinguishes a prior simple contract covering the same engagement. (3) A right of action is not barred until the lapse of a longer time than in case of simple contracts. (4) At common law, as a general rule, no consideration is necessary, although this is changed in some jurisdictions by statute, or modified by judicial decision.<sup>43</sup>

All contracts, except contracts under seal and contracts of record, are called "simple" or "parol" contracts. The word "parol" strictly means by word of mouth, and excludes writing; but the term is applied to all simple contracts, whether they are merely oral or in writing, even though they may be required to be in writing by statute. As we shall see, they all require consideration, the only distinction being the fact that some must be in writing.<sup>44</sup>

*Express and Implied Contracts.*—As to their mode of proof, contracts are divided into express contracts and implied contracts. An express contract is one in which the terms of the agreement are communicated openly, by language or its equivalent. An implied contract is one where there is no open and direct communication of assent, but assent is presumed or implied from the conduct of the parties and the circumstances of the case.<sup>45</sup>

§ 129. *Necessity for Writing—Statute of Frauds.* At common law bills of exchange and promissory notes must necessarily be in writing;<sup>46</sup> and by statute writing is in some States declared necessary for acceptance of a bill of exchange or other order for the payment of money, for the acknowledgment of a debt barred by the statute of limitations, for a new promise by an infant after attain-

42. Clark Contr. (2d ed.) 51; 9 Cyc. 297; 5 Cyc. 721; 13 Cyc. 505. See also "Seals," — Cyc. —.

43. Clark Contr. (2d ed.) 57; 9 Cyc. 310.

44. Clark Contr. (2d ed.) 48; 9 Cyc. 309. And *infra*, §§ 129, 130.

45. Smith Elem. L. 233; 9 Cyc. 242.

If a man says to another in words, "I will sell you this article for the market price," and the latter, taking it, says in words, "I accept your offer, and will pay the price," there

is an express contract, evidenced by express words. If a man sends another goods under such circumstances as to show that he expects payment, and the latter accepts and consumes the goods, there is an implied contract that he will pay the market price, evidenced by the conduct of the parties in sending the goods on the one side, and in accepting and using them on the other. Clark Contr. (2d ed.) 16.

46. See *infra*, § 141.



ing his majority, and for certain other contracts.<sup>47</sup> The most important statute requiring writing is called the "Statute of Frauds." The famous statute of frauds and perjuries was enacted in England in 1676,<sup>48</sup> and, as stated in its recital, had for its object the "prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury." The original statute, which is substantially followed by the statutes of most of our States, contains two sections, the fourth and the seventeenth, which affect the form of certain simple contracts.

The fourth section of the English statute enacts: "That no action shall be brought (1) whereby to charge an executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."<sup>49</sup> This section has been substantially enacted in most of the States in this country. In most jurisdictions, however, it is held that failure to comply with the requirements of this section does not render the contract void, but merely excludes parol proof, and renders it unenforceable.<sup>50</sup>

The seventeenth section of the English statute, which has been substantially followed in most of our States, enacts that "no contract for the sale of any goods, wares or merchandises, for the price of ten pounds sterling, or upward, shall be allowed to be good, except (1) the buyer shall accept part of the goods so sold, and actually receive the same, (2) or give something in earnest to bind the bargain, or in part payment; (3) or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."<sup>51</sup> As in the case of the fourth section, it is generally held that failure to comply with the provision of section seventeen does not render the contract void, but merely prevents its enforcement, but in some states it is void.<sup>52</sup>

47. Clark Contr. (2d ed.) 62; 9 Cyc. 298.

48. Statute of 29 Car. II, c. 3.

49. Clark Contr. (2d ed.) 65; 20 Cyc. 156 *et seq.*

50. Clark Contr. (2d ed.) 91; 20 Cyc. 279, 284.

51. Clark Contr. (2d ed.) 97; 20 Cyc. 238. See also *infra*, § 139.

52. Clark Contr. (2d ed.) 105; 20 Cyc. 279, 284.

§ 130. **Consideration.** The law requires that every simple or parol contract, to be binding, shall be based on what is deemed a valuable consideration.<sup>53</sup> The rule applies to all simple contracts, including those which are required to be in writing, either by the statute of frauds, or by other statutes, or by the common law.<sup>54</sup> "Consideration" is that which moves from the promisee to the promisor, at the express or implied request of the latter, in return for his promise. As the term is used in the law of contracts, it means a "valuable" consideration; that is, something having value in the eye of the law. If, for instance, one man, by paying another a sum of money, procures a promise from the latter in return to do something for his benefit, the money paid is the consideration for the promise. Consideration, however, need not be the payment of money. It may consist in any right, interest, profit, or benefit accruing to the promisor, or in any forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the promisee, provided the benefit conferred or detriment suffered is deemed of value in the eye of the law.<sup>55</sup> If a person does work for another on the latter's express or implied promise to pay for it, or gives another permission to use his property in return for a promise, or gives up his right to sue another on the latter's promise to pay money or do some other act, there is in each case either a benefit accruing to the promisor, or a detriment suffered by the promisee, or both; and this is the consideration for the promise. So also, if a person promises another to do something on the latter's promising him to do something, as where one man promises another to sell him goods, and the promisee promises to buy them, and pay for them, a right is conferred by each to the benefit of the other's promise, and a responsibility is undertaken by each. The promise of each is the consideration for the promise of the other.<sup>56</sup> The validity of the contract is not dependent upon the adequacy of the consideration, provided it is something of value in the eye of the law.<sup>57</sup>

Forbearance, or a promise to forbear, from doing what one is otherwise entitled to do is a sufficient consideration. Forbearance or a promise to forbear from doing what one cannot legally do is no consideration; but if a right is doubtful, so that there

53. Clark Contr. (2d ed.) 106; 9 Cyc. 309.

54. Clark Contr. (2d ed.) 110; 9 Cyc. 310.

55. Clark Contr. (2d ed.) 106; 9 Cyc. 308 *et seq.*

56. Clark Contr. (2d ed.) 107.  
An engagement to marry is a good

illustration of a contract consisting of mutual promises, in which the promise of each is the consideration for the promise of the other. See 5 Cyc. 1000.

57. Clark Contr. (2d ed.) 112; 9 Cyc. 365.

are reasonable grounds for trying to enforce it, forbearance to do so is a sufficient consideration.<sup>58</sup>

As a general rule doing or promising to do what one is already legally bound to do is no consideration, whether such previous obligation arises by virtue of a prior contract, or by law, independently of contract. Under this rule, for example, payment of part of a debt, without anything else, is no consideration for a discharge of the balance.<sup>59</sup>

A promise to do something which is either impossible in law, or physically impossible, is no consideration.<sup>60</sup> And a promise which is so vague and indefinite as to be incapable of enforcement is no consideration for a promise given in return.<sup>61</sup>

A consideration may be executory, as where it is a promise given in return to do something in the future, or it may be executed, as where it consists in the payment of money or the performance of services, but, as a rule, it cannot be past. A past consideration, so called, is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If, afterward, whether from good feeling or interested motives it matters not, he makes a promise to the person by whom he has been so benefited, and that promise is made upon no other consideration than the past benefit, the promise is gratuitous, and cannot be enforced.<sup>62</sup>

As we have seen, if the parties use the solemnities of a deed or contract under seal in which to record their agreement, no consideration is necessary at common law. It is sometimes said that a seal imports a consideration or that a consideration will be presumed, but the truth is that at common law a seal dispenses with the necessity for a consideration. This, however, has been changed in some jurisdictions.<sup>63</sup>

§ 131. **Parties.** The law requires, in addition to natural competency, that the parties shall possess certain other qualifications, in order that their contract may be binding upon them. For example, a person cannot bind himself by ordinary contracts until he is twenty-one years of age. Again, a married woman was, at common law, entirely without capacity to contract, and her right to do so is still somewhat limited. If any such incapacity exists in the parties, the law will not enforce their contract.<sup>64</sup> We shall refer in subsequent chapters to the capacity

58. Clark Contr. (2d ed.) 121; 9 Cyc. 335 *et seq.*

Forbearance as a consideration under the above rule arises in case of the compromise of disputed claims. See 8 Cyc. 505.

59. Clark Contr. (2d ed.) 126; 9 Cyc. 347.

60. Clark Contr. (2d ed.) 134; 9 Cyc. 326.

61. Clark Contr. (2d ed.) 134; 9 Cyc. 325.

62. Clark Contr. (2d ed.) 136, 137; 9 Cyc. 358.

63. 9 Cyc. 310. See *supra*, § 128.

64. Smith Elem. L. 229, 230.

to contract of infants,<sup>65</sup> insane and drunken persons,<sup>66</sup> married women,<sup>67</sup> aliens,<sup>68</sup> and corporations.<sup>69</sup>

§ 132. **Reality of Consent—Mistake, Fraud, etc.** The mutual consent which is essential to every agreement, and, therefore, to every contract, must be real. There may be no real consent, and therefore no contract, because of (1) mistake, (2) misrepresentation, (3) fraud, (4) duress, or (5) undue influence.<sup>70</sup>

**Mistake.**—Mistake is where the parties do not mean the same thing, or where one or both, while meaning the same thing, form untrue conclusions as to the subject-matter of the agreement. Mistake avoids the contract in the following cases only: (1) Where the mistake is as to the nature of a written contract, the execution of which is induced or procured by misrepresentation; (2) where the mistake is as to the identity of the person with whom the contract is made; (3) where the subject-matter of the contract, unknown to the parties, does not exist; (4) where two things have the same name, and the parties, owing to the identity of the names, do not mean the same subject-matter; or (5) where one of the parties is mistaken as to the nature of the promise made, and the other party knows, or has good reason to know, of the mistake. This, however, it seems, renders the contract merely voidable, and not void as in other cases of mistake.<sup>71</sup>

A man who has executed an instrument cannot avoid its operation by saying that he did not put his mind to it, or that he did not suppose it would have any legal effect. He must have been induced to execute it by some mistake or misrepresentation. If a man can read and does not read the document which he signs, or if, being unable to read, he signs without having it read, he will not be heard to say that the contract is void because he did not know or understand its provisions, unless he was prevented from reading it or having it read by fraudulent representation or other fraud.<sup>72</sup>

Mistake, where it has any effect, as a rule renders a contract absolutely void. At common law the contract may be repudiated if it is executory, or, if it has been executed in whole or in part, what has been paid or delivered under it may be recovered back. In equity a suit for specific performance may be brought, or suit may be brought to declare the contract void, or, if the mistake

65. See *infra*, § 177.

66. See *infra*, §§ 184, 186.

67. See *infra*, § 155.

68. See *infra*, § 188.

69. See *infra*, § 239.

70. Clark Contr. (2d ed.) 195; 9 Cyc. 388.

71. Clark Contr. (2d ed.) 196; 9 Cyc. 388 *et seq.*

72. Clark Contr. (2d ed.) 196, 197; 9 Cyc. 388 *et seq.*

is merely in drawing up the contract, suit may be brought to reform the instrument.<sup>73</sup>

*Misrepresentation.*—Misrepresentation is an innocent misstatement or non-disclosure of facts, and must be distinguished from (1) fraud, which is a false representation with knowledge of falsity, or what is equivalent to such knowledge, and from (2) conditions and warranties, which are representations constituting terms of a contract. Mere misrepresentation has at law no effect on a contract, except in the case of certain contracts which are said to be *uberrimae fidei*,<sup>74</sup> in which, from their nature, or from the particular circumstances, one party must rely on the other for his knowledge of the facts, and the other is bound to the utmost good faith, as in the case of contracts of marine, fire, or life insurance; and contracts between persons occupying a confidential relation, as between attorney and client, principal and agent, guardian and ward, trustee and beneficiary, etc. Where misrepresentation has any effect at all, as in the cases mentioned, it renders the contract voidable at the option of the party injured, and not, like mistake, absolutely void.<sup>75</sup>

*Fraud.*—Fraud in connection with contracts is substantially the same as the tort deceit already considered. It is a false representation of a material fact, or non-disclosure of a material fact under such circumstances that it amounts to a false representation, made with knowledge of its falsity, or in reckless disregard of whether it is true or false, or as of personal knowledge, with the intention that it shall be acted upon by the other party, and which is acted upon by him to his injury. In detail:

(1) There must, as a rule, be a false representation, and not mere silence; but non-disclosure or concealment of a material fact is equivalent to a false representation (a) where active steps are taken to prevent discovery of the truth; (b) where, although the representation is true as far as it goes, the suppression of facts renders it in fact untrue; or (c) where, under the circumstances, as in the case of a confidential relation, there is a duty to disclose the facts suppressed, so that failure to disclose them is an implied representation that they do not exist.<sup>76</sup>

(2) The representation must, as a general rule, be of a past or existing fact; and therefore fraud cannot ordinarily result from (a) mere expressions of opinion, belief, or expectation; (b)

73. Clark Contr. (2d ed.) 207; 9 Cyc. 392, 406.

As to specific performance see "Specific Performance," — Cyc. —.

As to reformation see "Reformation of Instruments," — Cyc. —.

As to cancellation see 6 Cyc. 282.

74. Meaning "the utmost good faith."

75. Clark Contr. (2d ed.) 208, 209; 9 Cyc. 408.

76. Clark Contr. (2d ed.) 220-224; 9 Cyc. 411 *et seq.*

promises or expressions of intention; although a representation that a certain intention exists, when it does not exist, is a false representation of an existing fact; or (c) representations as to law, as a general rule.<sup>77</sup>

(3) The misrepresentation must be of a material fact.<sup>78</sup>

(4) The representation must be of such a character, or made under such circumstances, that the other party has a right to rely upon it. Fraud, therefore, cannot be predicated upon (a) commendatory expressions as to value, prospects, and the like, sometimes spoken of as mere "puffing", or "trade talk"; or (b) in some jurisdictions, although not in others, false representations in cases where the means of knowledge are at hand, but the other party does not take advantage of them.<sup>79</sup>

(5) The representation must be made with knowledge of its falsity; but it is regarded as "knowingly" false (a) if it is actually known to be false; (b) if it is made in reckless disregard of whether it is true or false; or (c) in most jurisdictions, if the fact is susceptible of knowledge and the representation is made as of the party's personal knowledge.<sup>80</sup>

(6) The representation need not be made directly to the other party, but it must be intended to reach him, and to be acted upon by him.<sup>81</sup>

(7) The representation must deceive; that is, it must be relied upon by the other party and must induce him to act.<sup>82</sup> Thus, if a party does not believe a false representation, or disregards it and makes inquiries for himself, or if he knows that the representation is false, there is no fraud.<sup>83</sup>

(8) It is also necessary that the false representation shall result in injury to the party complaining.<sup>84</sup>

Fraud renders a contract, not void, as in the case of mistake, but merely voidable at the option of the party injured. Therefore:

(1) He may affirm the contract and sue for damages for the deceit,<sup>85</sup> or, if sued on the contract, he may set up the fraud in reduction of the demand by way of counter-claim. Or (2) he may rescind the contract, and (a) sue for damages for the deceit; (b) sue to recover what he has parted with; (c) resist an action at law

77. Clark Contr. (2d ed.) 220, 224-226; 9 Cyc. 416 *et seq.*

78. Clark Contr. (2d ed.) 220, 228; 9 Cyc. 425.

79. Clark Contr. (2d ed.) 220, 226-228; 9 Cyc. 426 *et seq.*

80. Clark Contr. (2d ed.) 220, 229; 9 Cyc. 422.

81. Clark Contr. (2d ed.) 220, 230; 9 Cyc. 424.

82. Clark Contr. (2d ed.) 220, 232; 9 Cyc. 426.

83. Clark Contr. (2d ed.) 232; 9 Cyc. 427.

84. Thus, where a person was induced to exchange his property for shares of stock by false representations of the other party, but the stock was worth what he gave, so that he suffered no injury, it was held that there was no fraud. Clark Contr. (2d ed.) 220, 233; 9 Cyc. 431.

85. See *supra*, § 111.

on the contract by setting up the fraud in defense; (d) resist a suit in equity for specific performance by setting up the fraud; or (e) sue in equity to have the contract avoided judicially.<sup>86</sup>

There are the following limitations to a party's right to rescind a contract for fraud: (1) He cannot rescind after affirming it by accepting its benefits, or by suing or otherwise acting upon it, after discovery of the fraud. (2) Delay in rescinding after discovery of the fraud, or after it should have been discovered, may amount to an affirmance at law, and may bar relief in equity on the ground of laches. (3) As a general rule the consideration must be returned as a condition precedent to the right to rescind; and as a rule, there can be no rescission if the subject-matter of the contract has been so dealt with that the parties cannot be placed *in statu quo*, that is, in the position which they originally occupied. As to this, however, there are some exceptions.<sup>87</sup> And (4) the right to rescind may be defeated by a third person's having acquired an interest under the contract for value, and without notice of the fraud.<sup>88</sup>

**Duress.**—Duress is actual or threatened violence or imprisonment, by reason of which a person is reasonably forced to enter into a contract; and when it has any effect it renders a contract voidable at his option, and not void. To affect the contract, however, (1) it must have been against or of the contracting party, or his or her wife, husband, parent, child, or other near relative; (2) it must have been inflicted or threatened by the other party to the contract, or by one acting with his knowledge or on his behalf; and (3) it must have induced the party to enter into the contract. By the weight of authority, the unlawful detention of another's goods under oppressive circumstances, or their threatened destruction, may constitute duress called "duress of goods."<sup>89</sup>

**Undue Influence.**—Undue influence is a species of fraud. It may be said generally to consist: (1) In the use by one in whom confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an undue advantage over him; (2) in taking an unfair advantage of another's weakness of mind;<sup>90</sup> or (3) in taking a grossly oppressive and unfair advantage of another's necessities and distress. Undue influence renders a contract voidable at the option of the injured party.<sup>91</sup>

86. Clark Contr. (2d ed.) 234; 9 Cyc. 431 *et seq.*

87. Clark Contr. (2d ed.) 234; 236; 9 Cyc. 435 *et seq.*

88. Clark Contr. (2d ed.) 234; 238; 9 Cyc. 442.

89. Clark Contr. (2d ed.) 240; 9 Cyc. 443 *et seq.*

90. By this is meant weakness of mind not amounting to insanity. As to insane persons see *infra*, § 184.

91. Clark Contr. (2d ed.) 246; 9 Cyc. 454.

§ 133. **Illegal Agreements.** An agreement is void and not enforceable at law, and therefore does not result in a contract, if its object or consideration is illegal; that is, in violation of law.<sup>92</sup> Unlawful agreements may be classified, according to their matter or object, as (1) agreements in violation of positive law; and (2) agreements contrary to public policy.<sup>93</sup>

As to the first, it is the rule that any agreement which involves the doing of an act which is positively forbidden by law, whether by the common law or by statute, or what amounts to the same thing, the omission to do an act which is positively enjoined by law, is illegal and void. Thus, agreements involving the commission of a crime, and those involving the commission of a civil wrong, are illegal and void as a breach of rules of the common law.<sup>94</sup> Among the statutes prohibiting agreements or rendering them void, may be mentioned statutes regulating the conduct of a particular trade, business, or profession, or statutes regulating dealings in particular articles of commerce; statutes regulating the traffic in intoxicating liquors; statutes prohibiting labor, business, etc., on Sunday; statutes prohibiting the taking of usury; statutes prohibiting gaming and wagers, including the buying and selling of stocks or commodities for future delivery, where the parties intend not an actual delivery, but a settlement by paying the difference between the market and the contract price; and statutes prohibiting lotteries.<sup>95</sup>

So also any agreement which is contrary to the policy of the law, or public policy, because of its mischievous nature or tendency, is illegal and void, although the acts contemplated may not be expressly prohibited either by the common law or by statute.<sup>96</sup> The test of public policy must be applied in each case as it arises, and therefore agreements which have been or may be declared contrary to public policy cannot be exclusively classified. The most general are: (1) Agreements tending to injure the public service, such as agreements for the sale of or traffic in a public office or its emoluments, agreements to influence legislation by personal solicitation of the legislators, or other objectionable means, etc.; (2) agreements involving or tending to the corruption of private citizens with reference to private matters, such as agreements tending to impair the integrity of public elections; (3) agreements tending to pervert or obstruct public justice, such as an agreement to stifle a

92. Clark Contr. (2d ed.) 254; 9 Cyc. 465 *et seq.*

93. Clark Contr. (2d ed.) 255; 9 Cyc. 466.

94. Thus, an agreement involving the compounding of a felony or the publication of a libel, or the perpetration of a fraud upon creditors, or

a fraud in connection with sales at auction, or a trespass, is illegal and void on this ground. Clark Contr. (2d ed.) 255, 256; 9 Cyc. 466.

95. Clark Contr. (2d ed.) 263; 9 Cyc. 475 *et seq.*

96. Clark Contr. (2d ed.) 281; 9 Cyc. 481 *et seq.*



criminal prosecution, even if it be not a crime; (4) agreements of an immoral tendency; (5) gambling transactions, including gambling transactions on the stock or produce exchange; (6) agreements tending to induce fraud and breach of trusts; (7) agreements affecting the freedom or security of marriage, or otherwise in derogation of the marriage relation; (8) agreements in derogation of the parental relation, such as an agreement whereby a father deprives himself of the custody of his child; (9) agreements in unreasonable restraint of trade, including combinations to prevent competition, control prices, and create monopolies; and (10) agreements exempting a person or corporation from liability for negligence.<sup>97</sup> With respect to agreements in restraint of trade, the general rule is that an agreement which unreasonably restrains a person from exercising his trade or business is contrary to public policy; but a restraint is not unreasonable if it is founded on a valuable consideration and is reasonably necessary to protect the interest of the party in whose favor it is imposed and does not unduly prejudice the interests of the public. It was formerly thought, and is still held in some States, that although the restraint may be unlimited as to time, it cannot be unlimited as to space, but the more recent decisions hold that such a restraint is not invalid, if it is reasonable under the circumstances.<sup>98</sup>

§ 134. **Operation of Contract — a. In General.** As a general rule, since agreement is necessary to every true contract, a contract can neither impose liabilities nor confer rights on a person who is not a party to it. But there are apparent exceptions to this rule: (1) Where one person represents another in entering into a contract; that is, in the case of contracts made through agents; and (2) where the rights or liabilities created by a contract pass to a person or persons other than the original parties by assignment. There are also real exceptions to the rule in some jurisdictions.<sup>99</sup> Where a contract is such as to constitute the promisor trustee for the benefit of a third person, the latter may sue in equity; and where money or other property has come into the promisor's hand, by virtue of the contract, for the use of a third person, the law creates a quasi-contract between him and such third person, on which the latter may sue.<sup>1</sup> These are merely apparent exceptions to the rule that a contract cannot confer rights on a person not a party to it. In some states the courts have made a real exception to the rule in the case of a promise made for the benefit of a third person, by allowing the latter to sue thereon under some circumstances. But

97. Clark Contr. (2d ed.) 281; 1. Clark Contr. (2d ed.) 351; 9  
9 Cyc. 483 *et seq.* Cyc. 376. As to quasi-contracts see

98. Clark Contr. (2d ed.) 305; *infra*, § 138.

9 Cyc. 523 *et seq.*

99. Clark Contr. (2d ed.) 347;

9 Cyc. 372 *et seq.*

in other states the right of a third person to sue in such case is denied.<sup>2</sup>

**b. Assignment of Contracts.** Under some circumstances a person not a party to a contract may take the place of one of the parties. This substitution is called "assignment" of the contract; and may be either (1) by the voluntary act of the parties, or (2) by operation of law. A person cannot assign his liabilities under a contract without consent of the other party thereto.<sup>3</sup> And rights arising out of a contract cannot be assigned at common law except: (1) By an agreement between the original parties and the intended assignee, which is subject to all the rules for the formation of a valid contract;<sup>4</sup> (2) in the case of negotiable instruments;<sup>5</sup> and (3) an assignment in equity is so far recognized at common law as to permit the assignee to sue thereon in the name of the assignor or his representatives.<sup>6</sup>

In equity, however, a chose in action, or rights under a contract, may be assigned whenever the contract is not for exclusively personal services and does not involve personal credit, trust, and confidence; but (1) notice is necessary to bind the debtor or person liable; and (2) the assignee takes subject to all such defenses as would have prevailed against the assignor.<sup>7</sup> And at the present time there are statutes in most of the States changing the old rule and allowing the assignment of choses in action and a suit at law by the assignee in his own name.<sup>8</sup>

Under certain circumstances and to a certain extent rules of law operate to transfer rights and liabilities arising out of a contract in the following cases:

(1) Upon the transfer of an interest in land. If a person, by purchase or lease, acquires an interest in land from another, on terms which bind them by contractual obligations in respect to their several interests, the assignment by either party of his interest will operate as a transfer of these obligations to the assignee under certain circumstances.<sup>9</sup>

(2) Upon a woman's marriage. At common law, upon a woman's marriage the right to reduce her choses in action into possession is transferred by law to her husband, and he becomes liable jointly with her, during coverture, upon her antenuptial contracts; but in most jurisdictions this is now changed by statute.<sup>10</sup>

2. Clark Contr. (2d ed.) 361; 9 Cyc. 374 *et seq.*

3. Clark Contr. (2d ed.) 360; 4 Cyc. 22. See *infra*, § 136, a.

4. Clark Contr. (2d ed.) 361. And *infra*, § 136, a.

5. See *infra*, § 141.

6. Clark Contr. (2d ed.) 361; 4 Cyc. 92; 9 Cyc. 7 *et seq.*, 91 *et seq.*

7. Clark Contr. (2d ed.) 361; 4 Cyc. 8, 96.

8. Clark Contr. (2d ed.) 361; 4 Cyc. 9, 96.

9. See Clark Contr. (2d ed.) 372; 11 Cyc. 108 *et seq.*

10. Clark Contr. (2d ed.) 377; and *infra*, § 154, c.

(3) By death. Death passes to the executors or administrators of the deceased all rights of action in respect of the personal estate, and to the extent of his estate, all liabilities chargeable upon it; but this does not include (a) contracts dependent on the personal services or skill of the deceased, or (b) contracts the breach of which involves a purely personal loss, as in the case of a contract to marry.<sup>11</sup>

(4) By bankruptcy. Under the bankruptcy act the contract rights and liabilities of the bankrupt are enforceable by and against his assignee or trustee.<sup>12</sup>

**c. Joint and Several Contracts.** A contract in which there are two or more parties on either or both sides may be (1) joint, (2) several, or (3) joint and several.

Where several parties join in a promise, (1) they are each liable for the whole debt or performance; (2) they are jointly, and not separately, liable, and must all be sued jointly; (3) where one of them dies, the liability devolves upon the survivors, and on the death of all, upon the personal representative of the last survivor; and (4) a release of one by the act of the promisee releases all of them. And where a promise is made to several jointly, (1) they are entitled jointly, and not separately, and must join in a suit on the promise; and (2) where one of them dies, the legal right devolves upon the survivors, and upon them alone.<sup>13</sup>

If two or more parties bind themselves severally to another in respect to the same matter or debt, their liability is separate and distinct, and they cannot be sued jointly. And if one party binds himself to several parties severally, their right to enforce the promise is separate, and not joint.<sup>14</sup>

Where a contract in respect to the promisors is both joint and several, (1) the promisee may sue all the promisors jointly or each one separately; and (2) if he sues jointly, he must sue all the promisors; he cannot sue less than all jointly. A promise cannot be so made in respect of one and the same matter as to entitle several persons under it both jointly and severally. They must be either entitled under it jointly only or severally only.<sup>15</sup>

Where one of several joint debtors pays the whole debt, he may, in the absence of an agreement to the contrary, enforce contribution from the others; that is, he may recover from them their proportionate share of the debt.<sup>16</sup>

Whether or not a contract with several persons on either or both

11. Clark Contr. (2d ed.) 377; 18 Cyc. 175, 239. 15. Clark Contr. (2d ed.) 384; 9 Cyc. 656 *et seq.*

12. See 5 Cyc. 341 *et seq.*

13. Clark Contr. (2d ed.) 379; 9 Cyc. 653. 16. Clark Contr. (2d ed.) 384; 9 Cyc. 794 *et seq.*

14. Clark Contr. (2d ed.) 381; 9 Cyc. 652 *et seq.*

sides is to be construed as joint or several, depends upon the intention of the parties as manifested in the evidence of their agreement. The following rules, however, may be stated: (1) A promise by two or more in the plural number is *prima facie* joint, while a promise in the singular is *prima facie* several; but this presumption will yield if, from the whole agreement, a contrary intention appears. (2) Subscriptions by a number of persons to promote some common enterprise, although joint in form, are construed as several promises. (3) If the words will admit of it, the contract, as regards the promisees, will be joint or several according as their interest is joint or several.<sup>17</sup>

§ 135. **Interpretation of Contract.** We may here consider shortly the mode in which the courts deal with a contract when it comes before them in litigation. In this connection we will consider how the existence and the terms of a contract are proved; how far, when proved to exist in writing, they can be modified by evidence extrinsic to that which is written; and what rules have been adopted for construing the meaning of the terms when severally before the court. The subject, therefore, divides itself into (1) rules relating to evidence, and (2) rules relating to construction.<sup>18</sup>

a. **Rules Relating to Evidence.** Under this head, omitting minor rules, the following general rules may be stated: The circumstances under which an alleged contract by word of mouth was made, what was said and done by the parties, and their intention to contract, are questions of fact, and are for the jury to decide in a jury case. Whether what was said and done amounts to a contract, and its effect, are questions of law for the court.<sup>19</sup>

Where a man is proved to have made a contract by word of mouth upon certain terms, he cannot say he did not mean what he said.<sup>20</sup>

Where parties have put into writing any portion of the terms of their agreement, they cannot alter by parol evidence that which is written; and where the writing purports to be the whole of the agreement, it can neither be added to nor varied by parol evidence of their unexpressed intention,<sup>21</sup> for where the parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of their engagement, all previous negotiations and agreements with reference to the subject-matter are presumed to have been merged in the written contract.<sup>22</sup>

17. Clark Contr. (2d ed.) 415; 9 Cyc. 659 *et seq.*

18. Clark Contr. (2d ed.) 386.

19. Clark Contr. (2d ed.) 386; 9 Cyc. 776.

20. Clark Contr. (2d ed.) 386; 9 Cyc. 578, 774.

21. Clark Contr. (2d ed.) 387; 9 Cyc. 763.

22. See 17 Cyc. 596.

But parol evidence is admissible: (1) To show that the defendant is the person who made the contract; (2) to supplement the writing where it only constitutes a part of the contract; or (3) to connect several documents which together show the contract, except where the contract is within the statute of frauds.<sup>23</sup> Parol evidence is also admissible to show that the writing is not in fact a valid agreement, as, for instance, because of incapacity of one of the parties, want of consideration, want of genuine consent because of mistake, fraud, etc., or illegality of object.<sup>24</sup>

Parol evidence as to the terms of a contract which appears to be complete in writing is also admissible: (1) In most jurisdictions to prove terms which are supplementary or collateral to so much of the agreement as is in writing, and which do not contradict the writing; (2) to explain terms of the contract which need explanation, as in the case of ambiguity and of technical terms; (3) to introduce a custom or usage into the contract; and (4) in the application of courts of equity of their peculiar remedy in cases of mistake.<sup>25</sup>

If a contract is under seal, the instrument itself is the contract and its proof, by proof of the sealing and delivery, proves the contract.<sup>26</sup> A writing not under seal, whether required by the statute of frauds or not, is not itself the contract, but only evidence of the contract, so that a simple contract may have to be proved, subject to the statute of frauds, by writing, or by proof of words or acts, or partly by one and partly by the other.<sup>27</sup>

**b. Rules as to Construction.** We may now consider shortly the rules of construction which determine the interpretation of a contract as it is proved to have been made between the parties. The three general rules of construction are as follows: (1) Words are to be understood in their plain and literal meaning,<sup>28</sup> except that (a) evidence of custom or usage may vary the usual meaning of words;<sup>29</sup> (b) technical words are to be given their technical meaning;<sup>30</sup> and (c) the rule is subject to the following rules as to giving effect to the intention of the parties. (2) An agreement should receive that construction which will best effectuate the intention of the parties.<sup>31</sup> (3) The agreement of the parties is to be collected,

23. Clark Contr. (2d ed.) 388; 9 Cyc. 763; 17 Cyc. 638, 647.

24. Clark Contr. (2d ed.) 390; 9 Cyc. 766, 771; 17 Cyc. 648, 694 *et seq.*

25. Clark Contr. (2d ed.) 392; 9 Cyc. 763, 772; 12 Cyc. 1081, 1091; 17 Cyc. 662.

26. Clark Contr. (2d ed.) 386, 388.

27. Clark Contr. (2d ed.) 387; 9 Cyc. 763.

28. Clark Contr. (2d ed.) 402; 9 Cyc. 578.

29. Clark Contr. (2d ed.) 402; 12 Cyc. 1081.

30. Clark Contr. (2d ed.) 402; 9 Cyc. 583.

31. Clark Contr. (2d ed.) 402; 9 Cyc. 577.

not from detached parts of the contract, but from the whole agreement.<sup>32</sup>

Subsidiary to these rules are the following, tending to the same end, that is, the effecting of the intention of the parties: (1) Obvious mistakes of writing or grammar, including punctuation, will be corrected in construing a contract.<sup>33</sup> (2) The meaning of general words will be restricted by more specific and particular descriptions of the subject-matter to which they apply.<sup>34</sup> (3) A contract susceptible of two meanings will be given the meaning which will render it valid, rather than one which will render it invalid.<sup>35</sup> (4) A contract will, if possible, be construed so as to render it reasonable rather than unreasonable.<sup>36</sup> (5) Words will generally be construed most strongly against the party who used them.<sup>37</sup> (6) In case of doubt, weight will be given to a practical construction placed upon the contract by the parties.<sup>38</sup> (7) Where there is a conflict between printed and written words, the latter will control.<sup>39</sup>

§ 136. **Discharge of Contract.** By discharge of contract is meant the loosing of the contractual tie and the freeing of the parties from their rights and liabilities under the contract. It is not meant necessarily that the parties are free from liability to an action for breach of the contract. The modes in which a contract may be discharged in this sense are: (1) By agreement; (2) by performance; (3) by breach; (4) by impossibility of performance under certain circumstances; and (5) by operation of law.<sup>40</sup>

a. **Discharge of Contract by Agreement.** A contract may be discharged by agreement to that effect between the parties, which agreement, however, must generally possess all the elements requisite to the formation of any other valid agreement. This may be: (1) By waiver, cancellation, or rescission; (2) by a substituted contract; or (3) by the happening of conditions subsequent, expressed or implied in the contract.<sup>41</sup>

(1) A contract may be discharged by an express agreement that it shall no longer bind either party. This process is called a waiver, cancellation, or rescission of the contract. A consideration is necessary to support such an agreement, except, at common law, where the agreement is under seal, so that the necessity

32. Clark Contr. (2d ed.) 402; 9 Cyc. 579.

33. Clark Contr. (2d ed.) 402; 9 Cyc. 585.

34. Clark Contr. (2d ed.) 402; 9 Cyc. 584.

35. Clark Contr. (2d ed.) 402; 9 Cyc. 586.

36. Clark Contr. (2d ed.) 402; 9 Cyc. 587.

37. Clark Contr. (2d ed.) 402; 9 Cyc. 590.

38. Clark Contr. (2d ed.) 402; 9 Cyc. 588.

39. Clark Contr. (2d ed.) 402; 9 Cyc. 584.

40. Clark Contr. (2d ed.) 417; 9 Cyc. 593.

41. Clark Contr. (2d ed.) 418; 9 Cyc. 593 *et seq.*

of a consideration is dispensed with. Where the contract is executory on both sides, a mere agreement between the parties that it shall no longer bind them is valid, for the discharge of each party by the other from his liabilities under the contract is a sufficient consideration for the promise of the other to forego his rights. If the agreement is not mutual, that is, if it is a waiver of his rights by one party only, there is no consideration and the agreement is void. If a contract has been executed on one side, an agreement that it shall no longer be binding without anything more is void for want of consideration.<sup>42</sup>

(2) A contract may be discharged by the substitution of a new contract, and this results (a) where a new contract is expressly substituted for the old one; (b) where the parties enter into a new contract which is inconsistent with the old one; (c) where new terms are agreed upon; or (d) where a new party is substituted for one of the original parties by agreement of all three, in which case it is called a "novation." As in the case of contracts generally, the agreement of the parties may be evidenced by their conduct. In the case of discharge by substituted agreement the change of rights and liabilities, and consequent extinction of those which before existed, form a consideration on each side for the new contract.<sup>43</sup>

(3) Again, a contract may contain within itself express or implied provisions for its determination under certain circumstances. These provisions are called "conditions subsequent." Such a discharge may take place by reason of (a) the non-fulfilment of a specified term of the contract; (b) the occurrence of a particular event; or (c) the exercise by one of the parties of an option to determine the contract, the option being given either by express provision in the contract or by a custom or usage forming part of the contract.<sup>44</sup>

**b. Discharge of Contract by Performance.** A contract is discharged by performance: (1) Where a promise has been given upon an executed consideration and is performed by the promisor; or (2) where one promise has been given in consideration of another promise, and both are performed.<sup>45</sup>

**c. Discharge of Contract by Breach.** Breach of contract is where a party thereto breaks through the obligation which it imposes. The effect of a breach of contract is that: (1) It always gives the party injured a right of action; and (2) it often, but not always, discharges the contract. A contract may be broken

42. Clark Contr. (2d ed.) 418, 419; 9 Cyc. 593, 594.

43. Clark Contr. (2d ed.) 420, 424; 9 Cyc. 595.

44. Clark Contr. (2d ed.) 427; 9 Cyc. 600.

45. Clark Contr. (2d ed.) 430; 9 Cyc. 601.

in any one of three ways: (a) A party may renounce his liabilities under it; (b) he may by his own act make it impossible for him to fulfil his obligations under it; or (c) he may totally or partially fail to perform what he has promised. Of these three forms of breach, the first two may take place while the contract is still wholly executory; that is, before either party is entitled to demand a performance by the other of his promise. The last can only take place at or during the time for performance.<sup>46</sup>

(1) Renunciation of the contract by one of the parties before the time for performance discharges the other party if he so chooses, but, according to the weight of authority, not otherwise, and entitles him to sue at once for the breach of contract. Renunciation of the contract by one of the parties in the course of performance discharges the other party from a continued performance of his promise, and entitles him to sue at once for the breach.<sup>47</sup>

(2) If a party to a contract, either before the time for performance or in the course of performance, makes performance or further performance by him impossible, the other party is discharged and may sue at once for breach of contract.<sup>48</sup>

(3) Whether or not failure of one party to perform the contract in whole or in part operates as a discharge of the other, or merely gives him a right of action for the breach, depends upon the nature of the respective promises, or, in other words, on the question whether they are (a) independent of each other, in which case, as a rule, there is no discharge; or (b) conditional upon each other, in which case, as a rule, there is a discharge.<sup>49</sup>

(a) Failure of one of the parties to a contract to perform an independent promise does not discharge the other party from liability to perform, but merely gives him a right of action for the breach.<sup>50</sup> A promise may be independent in the following ways:

(1) It may be absolute, that is, wholly unconditional upon performance by the other party; but promises, each of which forms the whole consideration for the other, will not be held independent of one another, unless the intention of the parties to make them independent is clear.<sup>51</sup> (2) It may be divisible, that is the promise may be susceptible of more or less complete performance, and the damage sustained by an incomplete performance or partial breach may be apportioned to the extent of the failure.<sup>52</sup> (3)

46. Clark Contr. (2 ed.) 443; 9 Cyc. 635.

47. Clark Contr. (2d ed.) 444; 9 Cyc. 635-639.

48. Clark Contr. (2d ed.) 448; 9 Cyc. 639.

49. Clark Contr. (2d ed.) 449; 9 Cyc. 641.

50. Clark Contr. (2d ed.) 450; 9 Cyc. 642.

51. Clark Contr. (2d ed.) 450; 9 Cyc. 642.

52. Clark Contr. (2d ed.) 450; 9 Cyc. 648.



Or it may be subsidiary, that is, the promise broken may be a term of the contract which the parties have not regarded as vital to its existence.<sup>53</sup>

(b) Where a promise is subject to a condition, that condition must, as regards its relation to the promise in time, be either (1) subsequent, (2) concurrent, or (3) precedent. In the case of a condition subsequent the rights of the promisee are determinable upon a specified event. The condition does not affect their commencement, but its occurrence brings them to a conclusion. We have already spoken of conditions subsequent in treating of discharge of contract by agreement.<sup>54</sup> In the case of a condition concurrent, the promisee's rights are dependent upon his doing, or being ready to do, something simultaneous with the performance by the promisor. Thus, where goods are sold and nothing said as to the time of delivery or time of payment, the seller cannot demand payment of the price unless he is ready at the same time to deliver the goods, and the buyer cannot demand possession of the goods until he is ready to pay the price.<sup>55</sup> In the case of a condition precedent the promisee's rights do not arise until something has been done or has happened, or some period of time has elapsed, as provided in the contract. Where the promise in the contract is conditional, the promisor may be discharged (a) by the promisee's failure to perform a concurrent condition, as explained above; (b) by the fact that there has been a total or subsequent failure on the promisee's part to do that which he was bound to do under the contract; or (c) by the falsity of some one statement or the breach of some one term, which, it appears, the parties considered vital to the contract.<sup>56</sup>

The performance of a condition precedent is discharged or excused, and the conditional promise made an absolute one, where the promisor himself prevents the complete performance by refusing to accept it when offered or otherwise waives the performance. Either party may waive any part of a contract, either expressly or by acts or declarations indicating relinquishment of any provision or part of a provision, without the performance of which, unless relinquished or waived, a recovery could not be had.<sup>57</sup>

**d. Discharge of Contract by Impossibility of Performance.** Impossibility of performance arising subsequent to the formation of a contract does not discharge the promisor, even though he was not in fault, except: (1) Where the impossibility is created by law, as by a statute rendering performance illegal, or

53. Clark Contr. (2d ed.) 450; 9 Cyc. 650.

54. See *supra*, § 136, a.

55. Clark Contr. (2d ed.) 459.

56. Clark Contr. (2d ed.) 458; 9 Cyc. 643 *et seq.*

57. See 9 Cyc. 646; Clark Contr. (2d ed.) 466.

by an injunction issued by a court preventing it; (2) where the subject-matter is destroyed, the rule being that where the continued existence of a specific thing is essential to the performance of a contract, its destruction, from no default of either party operates as a discharge; and (3) in the case of incapacity for personal services, the rule being that a contract which has for its object the rendering of personal services is discharged by the death or the incapacitating illness of the promisor.<sup>58</sup>

**e. Discharge of Contract by Operation of Law.** There are also certain rules of law which, operating upon certain sets of circumstances, will bring about the discharge of a contract, as in the case of (1) merger, (2) alteration of a written instrument, and (3) proceedings in bankruptcy.

(1) Acceptance of a higher security in the place of a lower merges or extinguishes the lower, but (a) the two securities must be different in their legal operation, the one of a higher efficacy than the other;<sup>59</sup> (b) the subject-matter of the two securities must be identical; and (c) the parties must be the same.<sup>60</sup>

(2) If a deed or contract in writing is altered by addition or erasure, it is discharged, provided the alteration is made (a) in a material part, so that it changes the legal effect of the instrument; it need not necessarily be prejudicial; (b) by a party to the contract, or by a stranger with his consent; (c) intentionally; and (d) without the consent of the other party; but not otherwise.<sup>61</sup>

(3) Bankruptcy effects a statutory release from debts and liabilities provable under the bankruptcy, when the bankrupt has obtained from the court an order of discharge.<sup>62</sup>

**§ 137. Remedies on Breach of Contract.** Where a contract is broken by one of the parties, the other party acquires or may acquire three distinct rights:<sup>63</sup> (1) He may be discharged from further performance as explained in the preceding section. (2) If he has done anything under the contract, he has a right to sue on implied contract, or, as it is called, on the *quantum meruit* or *quantum valebat*, a cause of action distinct from that arising out of the original contract, and based upon a contract created by law of quasi-contract, as explained in the next section.<sup>64</sup> (3) He has a right of action on the original contract, or term of the con-

58. Clark Contr. (2d ed.) 472; 9 Cyc. 627 *et seq.*

59. Thus, if the parties to a simple contract, whether oral or in writing, embody its contents in a contract under seal, the simple contract is merged and discharged.

60. Clark Contr. (2d ed.) 478; 2 Cyc. 633.

61. Clark Contr. (2d ed.) 479; 2 Cyc. 137; 9 Cyc. 635.

62. Clark Contr. (2d ed.) 484; 5 Cyc. 390 *et seq.*

63. Clark Contr. (2d ed.) 484.

64. Clark Contr. (2d ed.) 484; 9 Cyc. 685, 688; and *infra*, § 138.

tract broken, and may maintain (a) a suit to recover damages for the loss occasioned by the breach;<sup>65</sup> or (b) a suit to obtain specific performance of the contract by the other party. In other words, the law enforces the provision of the contract, either by compelling specific performance of its promises, or by awarding damages for its breach, to be paid by the party in fault to the party injured thereby.<sup>66</sup>

§ 138. **Quasi-Contract.** Ordinarily, a person can only maintain an action on contract against another by proving a contract in fact, that is, an express agreement or an agreement implied as a matter of fact. There are circumstances, however, under which the law will create a fictitious promise for the purpose of allowing the remedy by action of *assumpsit*, to maintain which, as the Latin word implies, a promise must be alleged. The obligation is not a contract in the true sense, but is called quasi-contract. It may be founded upon the judgment of a court; upon a statutory, official, or customary duty; or upon the principle that no one ought to unjustly enrich himself at the expense of another. These obligations are not contract obligations, for there is no agreement, but they are clothed with the semblance of contract for the purpose of the remedy, as explained above.<sup>67</sup>

Whenever one person requests or allows another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request and promise by the former to the latter — a request to make the payment and a promise to repay — and the obligation thus created may be enforced by *assumpsit*. It is a quasi-contractual obligation.<sup>68</sup>

So, wherever one person has money to which, in equity and good conscience, another is entitled, the law creates a promise by the former to pay it to the latter, and the obligation may be enforced by the action of *assumpsit*.<sup>69</sup>

And under certain circumstances, where one person has conferred upon another benefits in the way of property, services,

65. Clark Contr. (2d ed.) 484; 9 Cyc. 635, 685.

66. Smith Elem. L. 231.

By "specific performance" of a contract is meant the compelling of a party to do what he has promised to do in his agreement. The awarding of damages for the breach of a contract is the usual method of enforcing it, specific performance being resorted to only in those cases where the mere recovery of damages is not deemed an adequate remedy. The granting of specific performance is one of the leading subjects of equity

jurisdictions. Smith Elem. L. 231; "Specific Performance," — Cyc. —; *infra*, § 247.

67. Clark Contr. (2d ed.) 530; 9 Cyc. 243. And see 4 Cyc. 325 *et seq.*

68. Clark Contr. (2d ed.) 533; 27 Cyc. 832 *et seq.*

An illustration of such an obligation is where one of several sureties or joint debtors pays the whole debt. He is allowed to recover from each of the others in an action of *assumpsit* his proportionate share.

69. Clark Contr. (2d ed.) 536; 27 Cyc. 847 *et seq.*

etc., and cannot show a promise in fact by the latter to pay for them, the law will create an obligation, because of the receipt of the benefits, to pay what they are reasonably worth, and will allow an action of assumpsit, on the *quantum meruit* or *quantum valebat*, as it is called.<sup>70</sup>

## B. PARTICULAR CONTRACTS

The subjects with respect to which contracts may be made are almost infinite in their variety. All of them, however, are, speaking generally, subject to the general principles of the law of contracts mentioned in the preceding sections of this chapter. Sometimes, however, the general principles of the law are modified to meet the requirements of a peculiar subject-matter, or particular contracts, because of their nature or subject-matter, are not only governed by the general law of contracts, but are also subject to certain special rules not applicable to contracts in general. Of these the most important are the contract of sale, the contract of bailment, the negotiable contract, the contracts of suretyship and guaranty, and the contract of insurance.<sup>71</sup> Others might be mentioned, but for our present purpose it will be sufficient to refer shortly to these, leaving a more thorough study of the subjects for a later part of our course.

§ 139. **Sales.** A contract of sale is an agreement to transfer the title to a chattel in consideration of a price in money; and a sale is the transfer of the property in a chattel for a price in money. To a valid contract of sale, there are four requisites, namely, (1) parties competent to contract, (2) mutual assent, (3) a chattel to be sold, and (4) a price.<sup>72</sup> The requirement of competent parties and of mutual assent applies to contracts of sale to the same extent as to contracts in general. The peculiarity of this contract is that it has for its object the transfer of the title of a chattel from one person to another, and that this transfer must be in consideration of money. It is therefore distinguished from a contract of exchange, which is based upon a consideration other than money.<sup>73</sup>

As we have seen the seventeenth section of the statute of frauds provides that "no contract for the sale of any goods, wares and merchandises for the price of ten pounds sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same; or give something in earnest to bind the bargain or in part payment; or that some note

70. Clark Contr. (2d ed.) 547; 4 Cyc. 325; 28 Cyc. 1000; "Work and Labor," — Cyc. —.

71. Smith Elem. L. 236.

72. Smith Elem. L. 235; "Sales," — Cyc. —; Tiffany Sales 1, 2.

73. Smith Elem. L. 236; "Sales," — Cyc. —; Tiffany Sales 1 *et seq.*

or memorandum of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto authorized." This section of the statute of frauds applies only to contracts of sale where the thing to be sold is of the price of ten pounds or more. In this country substantially the same provision has been enacted in the various states, except that the amount mentioned as the minimum ranges from thirty to three hundred dollars, it being usually placed, however, at fifty dollars. There may be an oral as well as a written compliance with this section. A writing is required only when there has been neither a partial delivery and acceptance of the thing sold on the one hand, nor a payment in earnest or part payment of the price, on the other.<sup>74</sup>

Contracts of sale may be either executed or executory. An executed contract of sale, or an actual sale, is where the title to the chattel has passed. An executory contract of sale is one by which it is agreed that the title shall pass at some future time. Whether the title has passed or not depends upon the intention of the parties. The delivery or non-delivery of the property from seller to buyer is not a conclusive test. It sometimes becomes important to determine the exact time when the title passes. Suppose, for example, the property has been delivered to the buyer, and is destroyed by fire or accident while it is in his possession. If the title has passed, the loss is his; if not, it is that of the seller. Again, the title may pass although the goods are still in the custody of the seller. If they are destroyed after the passage of the title, the loss falls upon the purchaser, although they have never been delivered to him.<sup>75</sup>

§ 140. **Bailments.** A bailment may be defined generally as a delivery of the mere possession of personal property for a particular purpose, accompanied by a contract, express or implied, by which the terms and conditions of the delivery are specified; the person who delivers the property being called the "bailor" and the person to whom it is delivered the "bailee." It is distinguished from a sale by the fact that in case of a bailment there is a delivery of the mere possession, and the title remains in the bailor, while in a sale the title passes to the purchaser.<sup>76</sup> A bailment is often defined to be a delivery of personal property without the passage of the title; and this is, for practical purposes, a good definition. In all true bailments, however, there is not only a delivery, but also a contractual arrangement which regulates the rights and duties of the parties. Thus, if A delivers his watch to B, a jeweler, to be repaired, there is a contract, usually expressed, by which B agrees

74. See *supra*, § 129; Smith Elem. L. 236, 237; 20 Cyc. 238 *et seq.* 76. Smith Elem. L. 238; 5 Cyc. 161 *et seq.*; Hale Bailm. & Carriers

75. Smith Elem. L. 237, 238; 1 *et seq.*  
"Sales," — Cyc. —; Tiffany

Sales 82 *et seq.*

to repair the watch, and keep it safely, and return it to A when called for; while A, on his part, agrees to pay for the service a certain sum. This is an example of a typical bailment. It is sometimes said that an accompanying contract is not always necessary; and the case is cited of one who has goods placed in his carriage without his knowledge, and drives away with them. Here is a delivery, but certainly no agreement to assume any bailment responsibility; yet the law will treat the one who thus has the custody of goods thrust upon him as under a certain liability for their safe-keeping. This liability is by virtue of a quasi-contract, and it would seem more proper to refer to the delivery in such a case as a quasi-bailment, because the true contractual element which has long been regarded as the essential to a bailment proper does not exist.<sup>77</sup>

*Classification of Bailments.*—The leading forms of bailment at the common law were: (1) *Depositum*, or a deposit or delivery of goods with or to another for safe-keeping without any recompense; (2) *commodatum*, or a gratuitous loan; (3) *mandatum*, or bailment for the purpose of some gratuitous service upon the chattel; (4) *pignus*, pledge, or pawn, or the delivery of a chattel to be held as security for some debt or engagement, accompanied by a power of sale in case of default; (5) *locatio*; including (a) a loan for hire, and (b) a delivery for the purpose of having some service performed upon the chattel by the bailee, for which he is to be compensated. A more modern classification of bailments is according to the compensation or benefit, by which they are divided into: (1) Bailments for the exclusive benefit of the bailor, as in the case of *depositum* and *mandatum*; (2) those for the exclusive benefit of the bailee as in the case of *commodatum*; and (3) those for the benefit of both parties, as in the case of *pignus*, pledge, or pawn, and *locatio*. The common-law classification was merely an enumeration of some of the leading forms of bailment. It was based upon no particular principle of classification. It was adopted from the Roman law. It was later seen that a more practical division of bailments was to be found, based upon the principle of the benefit which the parties derive from the transaction. Such a classification is useful because it measures the liability of the bailee for injuries to the goods.<sup>78</sup> Thus:

*Liability of Bailee.*—It is a general principle of the law of bailments that the liability of the bailee for injuries to the goods which he holds is dependent upon the benefit which the respective parties derive from the bailment; that is: (1) Where the bailment is for

77. Smith Elem. L. 238. And see Cyc. 162-165; Hale Bailm. & Carriers 35-37.  
5 Cyc. 165 et seq.

78. Smith Elem. L. 239, 240; 5

the exclusive benefit of the bailor, the bailee is liable only for the results of gross negligence. (2) Where it is for the benefit of both parties, he is liable for ordinary negligence. (3) Where it is for the bailee's exclusive benefit, he is liable even for slight negligence. It is difficult to define these three different degrees of negligence. What is gross negligence depends very largely upon the surrounding circumstances. The same act might under different circumstances constitute any of the three different degrees. Ordinary negligence is the absence of that degree of care which an ordinarily prudent man would exercise under the circumstances. Slight negligence is less in degree than this, while gross negligence is greater.<sup>79</sup>

*Exceptional Bailees — Innkeepers and Common Carriers.*— There are certain extraordinary bailments to which these general rules of liability do not apply. The most important of these are those incident to the vocations of the innkeeper and the common carrier.

An innkeeper is a person who undertakes to provide lodging and necessities for all travelers who may require such entertainment, and who are able and willing to pay therefor. A guest is a traveler who receives accommodations at an inn. Our modern hotels are inns. An innkeeper should be distinguished from a mere boarding-house keeper. The difference between the two is stated in a leading case to be as follows: "In a boarding house the guest is under an express contract, at a certain rate, for a certain period of time. But in an inn there is no express engagement; the guest, being on his way, is entertained from day to day, according to his business, upon an implied contract." The keeper of a boarding house may accept or refuse one who applies for entertainment; but the innkeeper, holding himself out as ready to accommodate the public generally, must receive all who ask for entertainment, provided they conduct themselves properly, and are able and willing to pay for their accommodations. The relation of innkeeper and guest exists between the proprietor of the inn and transients who receive the accommodations of the house. An inn may, and usually does, have boarders who have entered into an express contract for accommodations for a greater or less time; but it is only for the benefit of the transient customers—the "guests," properly so called—that the extraordinary bailment liabilities of the innkeeper are imposed.<sup>80</sup>

A common carrier is a person who undertakes to transport from one place to another the goods of all persons who may choose to employ him for that purpose. In order to constitute himself a

79. Smith Elem. L. 240; 5 Cyc. 181 *et seq.*; Hale Bailm. & Carriers 23, 61, 92, 155, 201, 235.

80. Smith Elem. L. 241; 22 Cyc. 1070 *et seq.*; Hale Bailm. & Carriers 254 *et seq.*

common carrier, it is not necessary that the person hold himself out as willing to receive and transport all species of goods. He may restrict his offer to certain kinds; but, having once assumed the business of common carrier, he is obliged to carry for all persons indiscriminately. Carriers of goods may be either private carriers or common carriers. A private carrier is one who carries under special contract, without holding himself out to the world as ready to carry the goods of all who present their goods for transportation. The liability of private carriers for injuries to goods intrusted to them is governed by the general bailment law; but common carriers subject themselves to an extraordinary liability.<sup>81</sup>

By the weight of authority, at common law and in the absence of special contract, innkeepers and common carriers are each liable, *as insurers*, that is, absolutely liable, for any loss or injury to property intrusted to their care which is not caused by, (1) the act of God; (2) the public enemy; or (3) the act or negligence of the owner himself. The reason of the extraordinary liability imposed upon persons engaged in these vocations grows out of the public nature of the employment. It is well known that in early times the continental inns in Europe were frequently resorted to by banditti for purposes of plunder, and the hosts were often found to be in league with the robbers. No transient guest was secure in his person or property. The condition of affairs in England was very different, because of this salutary provision of the common law, which made the keeper of such a house responsible for the safety of the goods of his guest. It became his interest not to rob, but to protect, the wayfarer who came to partake of his hospitality. The law also recognized that there was a peculiar temptation incident to the carrier's employment. Obligated to pass through lonely ways, which were often infested with highwaymen, the pursuit of his calling would often be dangerous if he did not have an understanding with the robber class. The inducements to collude were strong, and the opportunity to do so without detection was great. Public policy seemed to demand that the carrier should assume liability as an insurer of the safety of the goods.<sup>82</sup>

§ 141. **Negotiable Instruments.** A negotiable contract is one the rights under which may be so transferred, by the delivery or indorsement of the writing by which they are evidenced, as to enable the transferee to sue at law in his own name, and subject to no equities between prior parties. The writing by which such a contract is evidenced is called a "negotiable instrument." The prin-

81. Smith Elem. L. 242; 6 Cyc. 365 *et seq.*; Hale Bailm. & Carriers 301 *et seq.*

82. Smith Elem. L. 242, 243; 6 Cyc. 276 *et seq.*; 22 Cyc. 1081 *et seq.*; Hale Bailm. & Carriers 351 *et seq.*



cial kinds of negotiable instruments are bills of exchange, promissory notes, and checks.<sup>83</sup>

It was a rule of common law, as we have seen, that choses in action could not be assigned. Courts of equity, however, would allow an assignment to be made subject to certain conditions. They would uphold an assignment made upon sufficient consideration when proper notice of such assignment had been given to the person against whom the right was to be enforced. But the assignee took the chose subject to all defenses which might have been introduced against the assignor. In other words, he took it subject to the "equities" between the original parties. By statutes in England and in this country, choses in action are now made assignable at law, subject to substantially the same restrictions which prevail in the equity courts.<sup>84</sup> But from time immemorial there was an exception to the common-law rule preventing such an assignment. This was in the case of bills of exchange, which might be so drawn as to be capable of passing from hand to hand by mere indorsement or delivery. And, by the English statute of 3 & 4 Anne, promissory notes were also made capable of being so transferred. These bills and notes were not only exceptions to the common-law rule forbidding assignment, but to the equitable and statutory rules as well; for not only could they be assigned, but if the assignee was a *bona fide* holder for value, and without notice of the equities between the original parties, he took the instrument free from such equities. In other words, he took the rights which the instrument, on its face, purported to give him. This peculiar quality of bills and notes, which at present applies also to checks, distinguishes them from instruments which are merely assignable. The quality itself is called "negotiability."<sup>85</sup>

A bill of exchange or a draft is an unconditional order for the payment of a certain sum of money at a specified time. The person making the order is called the "drawer"; the person to whom it is made, the "drawee"; and the person to whom the money is ordered paid, the "payee."<sup>86</sup> The payee has no rights as such against the drawee until the bill has been accepted by the latter. By accepting the bill, the drawee promises to pay it according to its terms. After acceptance, the drawee is called the "acceptor." A mere order on another for the payment of money does not, of course, have the effect of binding that other, for one man cannot impose contractual liability upon another without that other's

83. Smith Elem. L. 243; 7 Cyc. 520 *et seq.*

84. Smith Elem. L. 243, 244; 4 Cyc. 7 *et seq.* See *supra*, § 134, b.

85. Smith Elem. L. 244; 7 Cyc. 521; Norton Bills and Notes 1 *et seq.*

86. Smith Elem. L. 244; 7 Cyc. 525 *et seq.*

consent. The order amounts merely to an offer, and an acceptance is necessary before any contractual rights arise. When accepted, however, there is a complete contract.<sup>87</sup>

An ordinary form of a bill of exchange is:

" Boston, Jan. 2, 1896.

" At sight, pay to A. B., or order, one thousand dollars, value received, and charge to the account of C. D.

" To the First National Bank of Chicago, Ill."

The bill is usually accepted by the acceptor writing the word "Accepted," with his signature, on the instrument.

A promissory note is an unconditional written promise to pay a certain sum of money at a specified time. The person making the promise is usually referred to as the "maker"; the one to whom the promise is made is called the "payee."<sup>88</sup>

The form of a promissory note is usually as follows:

" Cleveland, Ohio, Jan. 2, 1896.

" One year from date, for value received, I promise to pay to A. B., or order, one hundred dollars, at the First National Bank of Cleveland. C. D."

In order that a bill or note may be negotiable, it must contain on its face words of negotiability. Bills and notes are either negotiable or non-negotiable. Negotiability is indicated by making the note or bill payable to order or to bearer. Thus, if it is payable to "A. or order," to "A. or bearer," "to the order of A.," or merely "to bearer," it is negotiable, but not so if it is merely payable to "A."<sup>89</sup>

A bill or note payable to bearer is transferable by mere delivery. An instrument payable to order requires indorsement for its transfer. By indorsement is meant the transfer of a negotiable instrument by some writing on the instrument itself. Indorsement must be accompanied by the delivery of the instrument in order to work a valid transfer thereof. Indorsement may be either in blank or special. An indorsement in blank is usually effected by the indorser's writing his name upon the back of the bill or note. The result of a blank indorsement is to make the instrument transferable by mere delivery. A special indorsement is one which directs payment to a particular person or his order; as, for example: "Pay to the order of G. H. [Signed] A. B."<sup>90</sup>

In 1897, for the purpose of providing uniform laws on the subject of commercial paper, statutes known as the "Negotiable In-

87. Smith Elem. L. 245; 7 Cyc. 757 *et seq.*

88. Smith Elem. L. 245; 7 Cyc. 532.

89. Smith Elem. L. 246; 7 Cyc. 606.

90. Smith Elem. L. 246; 7 Cyc. 791 *et seq.*, 810.

struments Law" were enacted by New York, Connecticut, Colorado, and Florida; and since then similar statutes have been enacted in twenty-five or more of the other States and in the District of Columbia.

§ 142. **Suretyship and Guaranty.** A contract of suretyship is a contract by which one person becomes responsible for the debt, default, or miscarriage of another. The one who thus becomes responsible for another's default is called a "surety"; the one for whose default he becomes responsible is referred to as the "principal."<sup>91</sup>

A contract of guaranty is a collateral undertaking by one person to be answerable for the payment of some debt or the performance of some duty or contract for another person who stands first bound to pay or perform. The person becoming so bound is called a "guarantor"; the one to whom he becomes bound is the "guarantee" or "creditor"; and the person whose debt or contract is guaranteed is the "principal" or "principal debtor."<sup>92</sup>

The terms "suretyship" and "guaranty," although often used as synonymous with each other, are not to be used indiscriminately. A surety is one who becomes responsible for the default of another at the same time when the principal becomes bound, in view of the same consideration, and, when the contract is reduced to writing, by the same instrument. The guarantor, however, becomes such at a different time from that when his principal is bound, by a different instrument, and often upon a separate consideration. The principal and surety are bound on the same contract, while the guarantor's obligation is purely collateral. A typical example of a contract of suretyship is found in an ordinary bond, by which both principal and sureties are "held and firmly bound" jointly to the obligee.<sup>93</sup>

As we have seen, the fourth section of the English statute of frauds, which is substantially followed by the statutes of the various States in this country, provides that "no action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." A contract of suretyship, therefore, must

91. Smith Elem. L. 247; "Principal and Surety," — Cyc. —.

92. See 20 Cyc. 1397, 1400. There can only be a contract of guaranty where there is some principal or sub-

stantive liability to which it is collateral.

93. Smith Elem. L. 247; 20 Cyc. 1400; "Principal and Surety," — Cyc. —.

be in writing, in order to be valid, and the words "any special promise to answer for the debt, default or miscarriage of another person" obviously include contracts of guaranty as well as contracts of suretyship.<sup>94</sup>

As a general rule, any act on the part of the creditor which discharges the principal debtor discharges the surety; and the latter is also discharged by any material alteration in the terms of the original liability without his consent. Thus, if the time of payment is extended for a definite period after payment is due, without the surety's consent, he is discharged. As it has been expressed: "The obligor and the obligee are bound to know that, if they find it convenient to change or vary the terms of the original contract, they must seek the assent of the surety, because it is his contract as well as theirs; and, if they will not do so, they take upon themselves the hazard, and thus loosen the bonds of the surety."<sup>95</sup> Substantially the same rule applies to the contract of guaranty.<sup>96</sup>

If the principal fails to meet his obligation, and the surety or guarantor pays it or any part of it, the latter may recover from the former the amount so expended in his behalf. The liability of the principal to reimburse the surety or guarantor for money expended by reason of his default is quasi-contractual. In the absence of an express contract to indemnify, the law will create a liability to do so, even though the principal protest against such liability.<sup>97</sup>

§ 143. Insurance. A contract of insurance is a contract whereby one person (usually a corporation) undertakes to compensate another if that other shall suffer loss. If the contract of insurance is reduced to writing, the instrument by which it is evidenced is called a "policy." Contracts of insurance are of different kinds, according to the nature of the loss against which a person is insured. The most common kinds of insurance are: (1) Fire insurance; (2) marine insurance; (3) accident insurance; and (4) life insurance.<sup>98</sup> Fire insurance indemnifies against the results of fire; <sup>99</sup> marine insurance against the perils of the sea; <sup>1</sup> accident insurance against unforeseen and accidental injuries; <sup>2</sup> and life insurance against death.<sup>3</sup> There are also at the present time various other kinds of insurance, as insurance of plate glass, boilers, etc.,

94. See *supra*, § 129; Smith Elem. L. 247; Clark Contr. (2d ed.) 66, 67; 20 Cyc. 160 *et seq.*

95. Smith Elem. L. 248; "Principal and Surety," — Cyc. —.

96. See 20 Cyc. 1471.

97. Smith Elem. L. 249; 20 Cyc. 1495; "Principal and Surety," — Cyc. —.

98. Smith Elem. L. 249. As to insurance generally see 22 Cyc. 1380.

99. See 19 Cyc. 565.

1. See 26 Cyc. 538.

2. See 1 Cyc. 230.

3. See 25 Cyc. 687.

insurance against hail, tornado, lightning, theft, etc., health insurance, employers' liability insurance, guaranty insurance, credit insurance, fraternal and mutual benefit insurance, etc.<sup>4</sup>

Perhaps no valid distinction can be drawn between the contract of insurance and the ordinary wagering contract. The law has, in recent years, condemned the ordinary wager, on the ground that it is demoralizing in its tendencies, but has always upheld insurance against loss as an exception to its sweeping rule which refuses to enforce gambling transactions. The contract of insurance is a contract of indemnity, and seems to be a necessity in the modern commercial world. A learned writer has said: "It is the most enlightened and benevolent form which the projects of self-interest ever took. It is in fact in a limited sense and a practicable method, the agreement of a community to consider the goods of its individual members as common. It is an agreement that those whose fortune it shall be to have more than average success shall resign the surplus in favor of those who have less." It is an agreement that those who have more than the average of misfortune shall, for a consideration, be relieved from the results thereof.<sup>5</sup>

As a general rule, the subject-matter of the insurance must be something in which the person who seeks insurance has an insurable interest. If one wishes to have his property insured against fire, he may do so; but he will not be allowed to insure another's property, in which he has no interest whatever, both because such a contract would be a mere wager, and because of the temptation in which he would be placed to destroy the property in order to secure the amount of the insurance. In other words, he cannot be insured against that which is no loss to him. The same principle holds true with some qualifications in all other forms of insurance.<sup>6</sup>

It is customary to reduce the contract of insurance to the form of a policy, but in the absence of a statute this is not necessary; forms of insurance.<sup>7</sup>

4. See 22 Cyc. 1386, and the cross-references, pp. 1383, 1384.

5. Smith Elem. L. 250. And see Vance Ins. 1 *et seq.*; Clark Contr. (2d ed.) 275, 277.

6. Smith Elem. L. 250; 19 Cyc. 583 *et seq.* (fire insurance); 25 Cyc. 701 *et seq.* (life insurance); 26 Cyc. 550 *et seq.* (marine insurance).

7. See 19 Cyc. 600; 25 Cyc. 716.

## CHAPTER XII

### PRINCIPAL AND AGENT

- § 144. The Relation in General.
- 145. The Parties to the Relation.
- 146. Unlawful Agencies.
- 147. Creation and Existence of the Relation.
  - a. In General.
  - b. Estoppel.
  - c. Creation by Law — Necessity — Quasi-Agency.
  - d. Ratification.
- 148. Rights and Liabilities of Principal and Agent Inter Se.
- 149. Rights and Liabilities as to Third Persons in Contract.
- 150. Liability as to Third Persons in Tort.
- 151. Termination of the Relation.

§ 144. *The Relation in General.* "Agency" is a term signifying the legal relations established when one man is authorized to represent and act for another, and does so represent and act for another.<sup>1</sup> A person who so represents another is called an "agent," and the one whom he so represents is called "the principal." "An agent, in the broadest sense, is a person authorized by another, called the principal, to act on his behalf. An agent, in the narrower sense in which the term is used to distinguish the person to whom it is so applied from other so-called agents, is a person authorized by another, called the principal, to act on his behalf, and represent him, in bringing him into legal relation with a third person."<sup>2</sup>

"*Agent*" and "*Servant*."— Although the terms "agent" and "servant" are frequently used interchangeably, there is a clear distinction between the relations of principal and agent and master and servant. "A servant is a person employed by another, called the master, to render to him, subject to his direction and control, personal services in the performance of acts which are not of a nature to create new legal relations between the employer and third persons. An agent is a person authorized by another, called the principal, to act on his behalf, and represent him in bringing him into the legal relations with third persons. Of course, one and the same person may be employed in the same capacity. For example, a servant may be directed by his master to make a sale, and to use the master's wagon in going to the place of sale; and on the way he may, by careless driving injure a third person; and in making the sale he may give a warranty which he was not authorized to give. Here the liability of the employer for the injury

1. Hufcutt Agency (2d ed.) 5.

2. Tiffany Agency 1. And see  
"Principal and Agent," 31 Cyc. —.

results from the relation of master and servant; while his liability for the warranty, if he is liable, results from the relation of principal and agent."<sup>3</sup>

"*Agent*," "*Servant*," and "*Independent Contractor*."—It is also necessary to distinguish the relation of master and servant and that of principal and agent from the relation which exists where one person undertakes to perform a certain work for another as an "independent contractor." The servant has practically no discretionary powers, while the independent contractor has full discretion except so far as he has limited himself by the terms of his contract. "If the person employed is one who undertakes to produce a given result, but is free to select the means and methods of accomplishment, in things not specified beforehand, and the employer does not retain the right to order and control the manner in which the work shall be done, the person employed is an 'independent contractor,' for whose wrongful acts, neglects, and defaults, the employer is not liable."<sup>4</sup>

An agent differs both from the servant and from the independent contractor, not, as it is sometimes said, because of the existence or absence of discretion or control, but because he is authorized to act on the employer's behalf, and represent him, in bringing him into legal relations with a third person, while neither an independent contractor nor a servant is so authorized. An illustration will make these distinctions clear. Let us suppose that A wishes to build a house. Two courses are open to him. He may take charge of the work himself, buying the material, and employing the workmen, who will be his servants; or he may enter into a contract with a person whose business is to build houses for others, in which that person agrees to bring into existence a house according to specified plans. This person is an independent contractor, for he merely undertakes to produce a completed result, and is not subject to the direction of A. Let us suppose, further, that A, or the independent contractor finds it necessary to purchase material for the house at a distant place. If it is not convenient for him to make this purchase in person, he will naturally delegate authority to make it to another, who, being thus authorized to bring him into legal relations with third persons, is his agent. The independent contractor, having secured materials, employs masons, carpenters, and other workmen or laborers, who are merely his servants.<sup>5</sup> Of course, one and the same person may be employed both as an independent contractor and as an agent. Thus if, in the above illustration, the independ-

3. Tiffany Agency 9, 10; and "Principal and Agent," 31 Cyc. —. As to the relation of master and servant see *infra*, § 168.

4. Tiffany Agency 6. See also 26 Cyc. 970; and "Principal and Agent," 31 Cyc. —.

5. See Smith Elem. L. 254.

ent contractor should be authorized to purchase material on A's credit, he would, for such purpose, be an agent.

*Classes of Agents.*—Agents are generally divided into classes according to the nature and extent of their authority or other considerations. Thus, agents are classed as universal, general, and special;<sup>6</sup> mercantile and non-mercantile; *del credere* and not *del credere*;<sup>7</sup> professional and non-professional;<sup>8</sup> gratuitous and paid.<sup>9</sup> There are also certain classes of agents who have acquired specific names based upon the nature of their duties. Among these may be mentioned factors or commission merchants, whose business it is to receive and sell goods upon commission;<sup>10</sup> brokers, like real estate brokers, stock brokers, merchandise brokers, etc., whose business it is to make bargains for others or to bring persons together to bargain;<sup>11</sup> auctioneers, whose business it is to sell property at public sale;<sup>12</sup> attorneys-at-law, whose business it is to act for others in litigation or other legal proceedings;<sup>13</sup> bank cashiers, who are the chief executive officers of banks, and through whom the financial operations of banks are generally transacted;<sup>14</sup> and shipmasters, who are agents of the owner for many purposes during the voyage.<sup>15</sup>

*Partners.*—The law of partnership is closely connected with the law of agency, for a partner virtually embraces the character both of a principal and of an agent. As a rule, in every ordinary partnership each member of the firm is the agent of the other partners for the purpose of the business of the firm, so that in contracting

6. A universal agent has been defined as one "appointed to do all the acts which his principal can personally do, and which he may lawfully delegate the power to another to do. While there is no reason why such an agency may not exist, it must be of the very rarest occurrence. A general agent is usually defined as one authorized to act for his principal in all matters concerning a particular business or employment or of a particular nature. A special agent is usually defined as one authorized to do a particular act or to act in a single transaction. Tiffany Agency 190, 191. And see "Principal and Agent," 31 Cyc. —.

7. A *del credere* agent is a mercantile agent, usually a factor, who, in consideration of additional compensation, guarantees to his principal the payment of debts that become

due through his agency. Tiffany Agency 437; 19 Cyc. 133.

8. Professional agents are such as attorneys-at-law, auctioneers, factors and brokers, etc., who hold themselves out as ready to serve the public generally. Tiffany Agency 12, 179.

9. A gratuitous agent is one who acts without compensation. Tiffany Agency 410; "Principal and Agent," 31 Cyc. —.

10. Tiffany Agency 12, 222; 19 Cyc. 115 *et seq.*

11. Tiffany Agency 13, 224; 19 Cyc. 186 *et seq.*

12. Tiffany Agency 13, 225; 4 Cyc. 1038 *et seq.*

13. Tiffany Agency 13, 227; 4 Cyc. 859 *et seq.*

14. Tiffany Agency 13, 220; 5 Cyc. 470 *et seq.*

15. Tiffany Agency 13, 221; "Shipping," — Cyc. —.



for the firm, for instance, he binds himself as principal and also, as agent, binds the other partners.<sup>16</sup>

§ 145. **The Parties to the Relation.** It is a general rule that any person may be a principal in a particular transaction who is capable of entering into the transaction himself.<sup>17</sup> In other words "capacity to enter into a contract of agency, or to act by means of an agent is coextensive with the capacity of the principal to contract."<sup>18</sup> On the other hand, any person, although incapable of contracting on his own behalf, may act as agent for and bind another, except an insane person and a child of tender years.<sup>19</sup> Inasmuch as the act of an agent is in law the act of his principal, incapacity of the agent to make a binding contract on his own behalf does not prevent him from making a binding contract on the part of his principal.<sup>20</sup> But capacity to enter into a *contract of agency*, as distinguished from capacity to act as an agent, is necessarily coextensive with the capacity of the agent to contract.<sup>21</sup> Thus, an infant may do any act through an agent which he is capable of doing in his own person, his capacity, however, being limited; for, as will be seen, he is not allowed to bind himself except for necessities and in a few other cases; and a married woman may contract through an agent so far, but so far only, as she is capable in law of contracting.<sup>22</sup> But infants or married women, although they may not be able to enter into valid contracts on their own behalf, may act as agents and bind others by contracts, if authorized. An infant, however, may be of such tender years as to be incapable of acting as agent in a particular matter, and idiocy, lunacy, or other form of insanity is also necessarily a disqualification.<sup>23</sup>

§ 146. **Unlawful Agencies.** A person cannot do through an agent what would be an illegal act if done in person, and a contract of agency which contemplates an illegal object is, like other illegal agreements, void. As we have seen, certain classes of agreements, either because of the illegality of the object, or because certain requirements of the law have not been complied with, or for other reasons, are prohibited, and if for any reason an agreement falls

16. See 30 Cyc. 477 *et seq.*; and *infra*, § 236.

17. Smith Elem. L. 254.

18. Tiffany Agency 94; "Principal and Agent," 31 Cyc. —.

There is an exception to this rule in the case of the appointment of an agent by an infant or lunatic by power of attorney under seal. At common law such an appointment is absolutely void, and not like the contracts generally of an infant or an insane

person, merely voidable. Tiffany Agency 94; and *infra*, §§ 177, a, 184.

19. Smith Elem. L. 254.

20. Tiffany Agency 105; "Principal and Agent," 31 Cyc. —.

21. Tiffany Agency 105; "Principal and Agent," 31 Cyc. —.

22. Smith Elem. L. 254; and *infra*, §§ 155, a, 177, a.

23. See Smith Elem. L. 254; Tiffany Agency 105; "Principal and Agent," 31 Cyc. —.

within the prohibited class it is void.<sup>24</sup> Any such agreement, since it would be inoperative and void if entered into by the principal in person, is, of course, void if entered into by the medium of an agent. The effect of illegality upon the contract of agency is the same. If the agreement between principal and agent falls within a class of agreements which the law prohibits, either because of the illegality of the object contemplated, or because of failure to comply with some legal requirement, or for any other reason, the agreement is a nullity, and as a rule neither party acquires any of the rights incident to the formation of the relation of principal and agent.<sup>25</sup>

§ 147. **Creation and Existence of the Relation — a. In General.** The relation of principal and agent may be created: (1) Expressly, either (a) by a sealed instrument, called a power of attorney, (b) by a written instrument not under seal, or (c) orally; (2) impliedly; (3) by estoppel; (4) by law in certain cases; or (5) by ratification, either express or implied.<sup>26</sup>

**b. Estoppel.** Where a person, either by words or conduct, represents or holds out, or permits it to be represented or held out, that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation or appearance of agency, with the person so held out as agent, even though no agency existed in fact. This is merely an application of the general rule that where a person, by words or conduct, causes another to believe in the existence of a certain state of facts, and to act upon that belief, he will be estopped as against the other, to allege a different state of facts to the other's injury. While, in theory, a person cannot become the agent of another without his consent, the other, if he has represented that an agency exists, may be estopped to deny its existence, and this representation may be either by words or by conduct. This apparent agency, which is treated as a general agency to the extent above stated, is termed an "agency by estoppel."<sup>27</sup>

**c. Creation by Law — Necessity — Quasi-Agency.** A quasi-agency as distinguished from an agency in the true sense, as arising from appointment, may be established by operation of law in certain cases. In certain relations, generally under circumstances of necessity peculiar to the particular relation, the law confers upon one party thereto power to make contracts which are binding upon

<sup>24</sup> Tiffany Agency 91; and *supra*, § 133.

<sup>25</sup> Tiffany Agency 92; and "Principal and Agent," 31 Cyc. —.

<sup>26</sup> Smith Elem. L. 256; Tiffany

Agency 15; "Principal and Agent," 31 Cyc. —.

<sup>27</sup> Tiffany Agency 34, 35; "Principal and Agent," 31 Cyc. —.

the other without his authority and in some cases against his will.<sup>28</sup> Such, as we shall see, is the power of a wife, and in some jurisdictions of a child, in case of non-support, to pledge the credit of the husband or father for necessities;<sup>29</sup> the power of a master of a ship to bind the owner in certain cases of necessity arising during the voyage;<sup>30</sup> and the power of a railway servant, in some jurisdictions, in case of accident and emergency, to employ a surgeon on behalf of the railroad company for an injured employee.<sup>31</sup> In such cases it is frequently said that the law creates the agency from necessity, but, while this is true in a sense, it is not altogether accurate, for the agency is not always based upon necessity. It is more properly described as agency quasi *ex contractu*.<sup>32</sup>

**d. Ratification.** The relation of principal and agent is created by ratification when one person adopts an act done by another person, assuming to act on his behalf, but without authority or in excess of authority, with the same force and effect, subject to a few exceptions, as if the relation had been created by appointment beforehand. An act done by one person on behalf of another, even though in the other's name, is clearly not his act, unless done with his assent. Under the doctrine of ratification, however, the person on whose behalf the act was done may adopt it as his own, with its benefits and burdens, if he sees fit; and as a general rule, the ratification relates back, and is equivalent to previous authority.<sup>33</sup>

Every act, lawful or unlawful, done by one person on behalf of another, without prior authority, which is of such a nature that if done pursuant to prior authority it would in law be his act, is capable of ratification by the person on whose behalf it is done.<sup>34</sup> But in order that it may be capable of ratification, an act must be done by one who assumes to act on behalf of an existing principal, who must be named or otherwise described. As a rule no act performed by one man can be adopted by another as his own unless it was done professedly on his behalf.<sup>35</sup>

An act may be ratified by any words or conduct showing an intention upon the part of the person ratifying to adopt the act in whole or in part as his own; except that, if authority to do an act must be conferred by particular form, as by an instrument

28. Tiffany Agency 39; Clark Contr. (2d ed.) 499; "Principal and Agent," 31 Cyc. —.

29. Tiffany Agency 39, 41; and *infra*, §§ 155, d, 162, a.

30. Tiffany Agency 41; "Shipping," — Cyc. —.

31. Tiffany Agency 39; 10 Cyc. 926.

32. Tiffany Agency 39; Anson

Contr. 335; Clark Contr. (2d ed.) 499; "Principal and Agent," 31 Cyc. —. As to quasi-contract see *supra*, § 138.

33. Tiffany Agency 46; "Principal and Agent," 31 Cyc. —.

34. Tiffany Agency 48; "Principal and Agent," 31 Cyc. —.

35. Tiffany Agency 54; "Principal and Agent," 31 Cyc. —.

under seal or in writing, ratification must ordinarily be by like form.<sup>36</sup> Ratification is not binding upon the person ratifying unless made with knowledge of all the material facts, or unless made with the intention to ratify whatever the facts may be.<sup>37</sup>

As already intimated, the general rule, subject, however, to certain exceptions, is that the effect of ratification is by relation to invest the person on whose behalf the act ratified was done, the person who did the act, and third persons with the same rights and duties as if the act had been done with the previous authority of the person ratifying.<sup>38</sup>

#### § 148. Rights and Liabilities of Principal and Agent *Inter Se*.

The obligations of principal and agent *inter se* are to a great extent determined by the contract of employment or the terms of appointment; and the peculiar rights and obligations of some classes of agents, such as factors and brokers, auctioneers, attorneys, shipmasters, etc., are defined by usage or by law. But there are certain duties which result from the very nature of the relation, and which are common to all agencies, except in so far as they are modified by express or implied agreement between the parties; and for breach of these duties they are respectively liable *inter se*.<sup>39</sup> These may be shortly stated as follows:

The duties of the agent are: (1) To account to the principal for the money or property of the latter which comes into his hands in the course of his employment; (2) to obey instructions, to use ordinary diligence in the discharge of his duties, to employ any special skill or capacity which he may profess for the work in hand, and to notify his employer of circumstances which he ought to know; (3) to exercise good faith and loyalty to the principal in the transaction of the business intrusted to him; and therefore to make no profit other than the commission or reward promised, either (a) by taking reward or compensation from others, or (b) by becoming principal as against his employer, or acquiring an interest in the subject-matter of the agency, or any rights adverse to the principal; and (4) as a rule, an agent cannot delegate his powers, although there are circumstances under which he may employ sub-agents or servants to perform acts not involving the exercise of a discretion vested in him by his principal.<sup>40</sup>

The duties of the principal are: (1) To pay the agent the commission or reward agreed upon; (2) to reimburse the agent for expenses incurred in the execution of his authority; and (3) to

36. Tiffany Agency 60; "Principal and Agent," 31 Cyc. —.

37. Tiffany Agency 61; "Principal and Agent," 31 Cyc. —.

38. Tiffany Agency 75; "Principal and Agent," 31 Cyc. —.

39. Tiffany Agency 395 *et seq.*; "Principal and Agent," 31 Cyc. —.

40. Clark Contr. (2d ed.) 507; Tiffany Agency 395 *et seq.*; "Principal and Agent," 31 Cyc. —.

indemnify the agent for acts lawfully done in the execution of the agency.<sup>41</sup> But an agent is not entitled to remuneration, reimbursement, or indemnity in respect to any transaction which is to his knowledge illegal, for the law will not aid one in asserting a right based upon an illegal transaction.<sup>42</sup>

**§ 149. Rights and Liabilities as to Third Persons in Contract.**

The rights and liabilities of principal and agent as to third persons on contracts depend, not only upon the extent of the authority of the agent, actual or apparent, but also upon whether the contract is made on behalf of a disclosed or undisclosed principal.

*Named Principal.*—Where an agent contracts as agent for a principal who is named, the following rules apply: (1) The party with whom the contract is made is liable to the principal directly.<sup>43</sup> (2) The principal is liable directly to the party with whom the contract is made (a) if the agent acted within the scope of his actual authority; (b) if the agent acted within an apparent authority with which he was clothed by the principal, although contrary to private instructions and limitations, unless the third person has notice that the agent is exceeding his actual authority; the principal being estopped to deny that his agent has acted within the scope of his authority; or (c) if the contract, although unauthorized, has been ratified.<sup>44</sup>

*Undisclosed Principal — Name Undisclosed.*—Where an agent enters into a contract, disclosing the existence, but not the name, of his principal, the following rules apply: (1) He is not personally liable if he contracts as agent only, and the other party so understands. If credit is given to the agent, the other party may hold him personally, or may hold the undisclosed principal, at his election. (3) Unless the contrary clearly appears, it will be assumed that the other party intended to accept the alternative liability of agent or principal. (4) In the case of negotiable instruments, an unnamed principal cannot be sued.<sup>45</sup>

41. Clark Contr. (2d ed.) 507; Tiffany Agency 439 *et seq.*; "Principal and Agent," 31 Cyc. —.

42. Tiffany Agency 459; Clark Contr. (2d ed.) 336; "Principal and Agent," 31 Cyc. —.

43. Clark Contr. (2d ed.) 512; Tiffany Agency 302; "Principal and Agent," 31 Cyc. —.

44. Clark Contr. (2d ed.) 512; Tiffany Agency 180 *et seq.*; "Principal and Agent," 31 Cyc. —.

"Apparent authority, as the term is used in the above text, includes authority to do whatever is usually necessary to carry into effect the

principal power conferred upon the agent and to transact the business which he is employed to transact; and the principal cannot restrict his liability for acts of his agent within the scope of his apparent authority by limitations thereon of which the person dealing with the agent has no notice." Tiffany Agency 180.

As to estoppel see *supra*, § 147, b. As to ratification see *supra*, § 147, d.

45. Clark Contr. (2d ed.) 519; Tiffany Agency 303 *et seq.*, 330 *et seq.*; "Principal and Agent," 31 Cyc. —.

*Same — Existence Undisclosed.*— Where an agent enters into a contract on behalf of his principal, but without disclosing the principal's existence, the following rules apply: (1) The other party may, at his election, hold either the principal or the agent, except (a) where the contract is under seal, or a negotiable instrument; (b) where the terms of the contract are incompatible with the existence of agency; (c) where the other party has once made his election to hold one or the other; and (d) where the principal, while exclusive credit was given to the agent, has settled with the agent for what he has received. (2) The principal may sue on such contract, notwithstanding his existence was not disclosed to the other party, subject to the other party's right to set up any defense he might have used against the agent.<sup>46</sup>

§ 150. *Liability as to Third Persons in Tort.* A person is liable for a tort committed by another pursuant to his command, or which he has duly ratified; and a principal is liable for the tort of his agent, not arising in a false representation, committed when acting in the course of his employment and in furtherance of it; but not otherwise.<sup>47</sup>

The principal is liable for the fraud of his agent, committed for the principal's benefit, when the false representation by means of which the fraud is committed is made as an inducement to a third person in a transaction which is within the scope of the agent's actual authority, or which is within the scope of his apparent authority, as that term has already been explained, unless the person dealing with the agent and injured by the fraud has notice that the transaction or the representation is unauthorized.<sup>48</sup>

In some jurisdictions it is held that when the principal has clothed the agent with power to do an act resting upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, of the existence of which the execution of the power is itself a representation, a third person dealing with the agent in good faith pursuant to the apparent power may rely upon the representation, and the principal is estopped from denying the authority of the agent to make it, to such person's prejudice; and consequently that if the agent exercises the power when such fact does not exist, and fraudulently, the principal is answerable in tort to the person injured by the fraud, although it was committed by the agent for his own benefit or for the benefit of

46. Clark Contr. (2d ed.) 521; Tiffany Agency 231 *et seq.*, 302 *et seq.*, 330 *et seq.*; "Principal and Agent," 31 Cyc. —.

47. Tiffany Agency 268, 275; "Principal and Agent," 31 Cyc. —.

48. Tiffany Agency 275; "Principal and Agent," 31 Cyc. —.

some person other than the principal. In other jurisdictions, however, this rule is not recognized.<sup>49</sup>

When a third person, in dealing with an agent, is guilty of fraud to the injury of the principal, he is liable to the principal for the damage thereby incurred; and when a third person colludes with the agent in defrauding the principal, they are jointly and severally liable to the principal for the damage thereby incurred.<sup>50</sup>

Where loss or injury is caused to a third person by the wrongful act or omission of an agent while acting on behalf of his principal, the agent is personally liable therefor, whether he is acting with the authority of the principal or not, to the same extent as if he were acting on his own behalf.<sup>51</sup> But an agent is not liable to a third person merely by reason of failure to perform a duty which he owes to his principal, although, if he does enter upon the performance of any act, he is liable to a third person for any injury resulting from his failure to exercise such reasonable care in the manner of its performance as he owes to such person.<sup>52</sup>

An agent who is in the possession of, or has a special property in, the goods of his principal may maintain an action against a third person for trespass or conversion.<sup>53</sup>

§ 151. **Termination of the Relation.** The authority of an agent may be determined (1) by agreement (2) by an act of one of the parties, or (3) by operation at law.

(1) Termination of the authority of an agent by agreement may be (a) by performance of the object of the agency; (b) by the efflux of a specified time; or (c) by ratification or renunciation of the agency in accordance with the express or implied terms of the contract.<sup>54</sup>

(2) Termination of the authority of an agent by act of the parties is where one of the parties revokes or renounces the agency in breach of the contract of employment. The authority is revoked, although the contract is broken.<sup>55</sup> But this rule is sub-

49. Tiffany Agency 276, 288; "Principal and Agent," 31 Cyc. —.

50. Tiffany Agency 326; "Principal and Agent," 31 Cyc. —.

51. Tiffany Agency 379; "Principal and Agent," 31 Cyc. —.

52. Tiffany Agency 379; "Principal and Agent," 31 Cyc. —.

53. Tiffany Agency 394; "Principal and Agent," 31 Cyc. —.

54. Clark Contr. 524; Tiffany Agency 133 *et seq.*; "Principal and Agent," 31 Cyc. —.

55. As stated above, an agency may be revoked or renounced in accordance with express or implied terms in the contract of employment.

Such a determination of the agency, although in a sense by the act of the parties, is by agreement. The contract of employment is not broken. On the other hand, one of the parties may revoke or renounce the agency, not in accordance with the terms of the contract, but in violation of them. The *agency* in this case is determined by the act of the party, but it is determined contrary to agreement. The contract of employment is broken, and the other party may recover his damages for the breach as in the case of any other breach of contract. The authority, however, subject to certain exceptions, is ef-

ject to the following exceptions or qualifications: (a) Authority cannot be revoked where it is coupled with an interest.<sup>56</sup> (b) Notice of the revocation must be given to those to whom the agent has been held out.<sup>57</sup> "Where a principal has by words or conduct represented that an agent is authorized to act on his behalf, he is bound by the acts of the agent, notwithstanding termination of his authority otherwise than by death, bankruptcy, or marriage of the principal, or by war, with respect to third persons dealing with the agent in good faith in reliance upon such representation, without notice of such termination."<sup>58</sup>

(3) Termination of the authority of an agent by operation of law results from (a) the destruction of the subject-matter of the agency; (b) the bankruptcy of either party; (c) at common law, the marriage of a *feme sole* principal; (d) the insanity of either party; or (e) the death of either party. But an authority coupled with an interest is not revoked by operation of law in such cases.<sup>59</sup>

fectually determined, notwithstanding the revocation is in violation of the contract of agency. Clark Contr. (2d ed.) 524, 525; Tiffany Agency 136; "Principal and Agent," 31 Cyc. —.

56. Clark Contr. (2d ed.) 524.

An authority is "coupled with an interest," as the term is generally used in the United States, when it is vested in one in whom is also vested such an interest or estate in the thing which is the subject of the authority that he can exercise the authority in his own name. Tiffany Agency 152.

Where an authority is given for a valuable consideration, to secure or

effect some benefit, independent of the agent's compensation, it is irrevocable by act of the principal, and is not terminated by the death, insanity, marriage, or bankruptcy of either party. Tiffany Agency 152; "Principal and Agent," 31 Cyc. —.

57. Clark Contr. (2d ed.) 524; "Principal and Agent," 31 Cyc. —.

58. Tiffany Agency 151; "Principal and Agent," 31 Cyc. —.

59. Clark Contr. (2d ed.) 525; Tiffany Agency 133 *et seq.*; "Principal and Agent," 31 Cyc. —.

As to "authority coupled with an interest" see *supra*, note 56.



## CHAPTER XIII

### DOMESTIC AND PERSONAL RELATIONS

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#### A. DOMESTIC RELATIONS—HUSBAND AND WIFE

§ 152. **Marriage**—a. In General. Marriage is the voluntary union of one man and one woman, to continue during life or until set aside by judicial decree.<sup>1</sup> This relation is the basis of the domestic relations. In the earliest stages of civilization it is quite certain that the union of the two sexes was entirely promiscuous. Marriage even in the most rudimentary form did not exist. At the time, however, of the earliest authentic record there seems to have been recognized a more or less definite relation, although it does not seem to have been governed by any very well-established

1. See Smith Elem. L. 142; 26 Cyc. 821.

principles. Numerous instances are on record of marriage by capture, which seems to be still the prevailing form in parts of Australia and in various islands of the South Pacific. This seems to have been resorted to even in the early history of Rome, for it is said that Romulus, the founder of the Eternal City, captured the Latin and Sabine women and made them the consorts of his Roman youths. The two leading types of marriage among the less civilized races were polyandry, or plurality of husbands, and polygamy, or plurality of wives. The former is found to-day in practice among some of the native tribes of India. The latter is in vogue at present among many nations who are far advanced in civilization. The women of Malabar, in India, usually have five or six husbands. In one tribe it is said to be law that when a girl marries a man she also becomes the wife of all the younger brothers of the husband, while he in turn becomes the husband of all her younger sisters. Polygamy, as is well known, is practised among the Turks and other Eastern peoples. Monogamy, which is the only form of marriage now recognized by Christian governments, took centuries for its development. In the primitive ages, woman was a slave. Promiscuity, capture, polygamy, were the indications of her degradation. With the establishment of a monogamous marriage her rise began. In the modern law books marriage is often referred to as a mere civil contract; but the truth of this statement depends upon whether we are considering the relation existing between husband and wife or the means by which that relation is entered upon. Although the relation is entered upon by means of a contract, it is not simply a contract relation, but a relation of states. Once entered into, obligations are imposed by law, of which neither party can relieve himself unless the relation is terminated. If it were simply a contract relation, the parties could by their own agreement set it aside, whereas the termination of the marriage relation can take place only by an action on the part of the agencies of government, or by the death of one of the parties.<sup>2</sup>

**b. Impediments to Marriage.** Under the American law only those persons may enter into the marriage relation who are free from certain disqualifications. The chief of these disqualifications are: (1) Relationship within the prohibited degrees; (2) the existence of a prior marriage not yet dissolved; (3) the lack of sufficient age; (4) the lack of sufficient mental capacity; (5) the lack of sufficient physical capacity; and (6) in some jurisdictions difference in race or color.<sup>3</sup>

These disqualifications can be considered here only in a very brief manner. The disqualifying relationship referred to may be

2. See Smith Elem. L. 142, 143; 26 Cyc. 825.

3. See Smith Elem. L. 144; 26 Cyc. 842 *et seq.*

either that of consanguinity, or blood relationship, or affinity, which signifies relationship by marriage. Further, consanguinity may be either lineal, that is, such as exists between parent, child, grandparent, etc., or collateral, that is, such as exists between brother and sister, cousins, and other more distant relations. It is a general rule that persons lineally related to each other cannot enter into a valid marriage. Persons related by collateral consanguinity may not, as a general rule, marry, if their relationship is within the third degree according to the civil-law method of computation. This plan of estimating was to commence at the person furthest removed from the common ancestor, reckoning up to the common ancestor, and then down to the other person, counting one degree for each person met in the ascent and descent. Thus, let us suppose the case of first cousins: The common ancestor would be their grandfather. From him each cousin is two degrees removed. Hence the cousins themselves are related to each other in the fourth degree. In most of the States of this country, the statute, in dealing with this subject, mentions particularly each relationship by consanguinity or affinity which results in a disqualification.<sup>4</sup>

From the fact that our law recognizes only monogamous marriages, it naturally follows that if there is a marriage already in existence to which either of two persons is a party, those two persons cannot enter into a valid union until the former marriage is legally set aside. But this does not apply, of course, where the former marriage is absolutely void.<sup>5</sup>

The contract by which the marriage relation is entered into differs from other contracts in another important respect. Usually a valid contract cannot be formed, as we shall hereafter see, unless the parties thereto have arrived at the age of majority, which, in most States, is twenty-one years; but a valid contract of marriage may be made much earlier. Under the common law, the age of consent for this purpose was fourteen in males, and twelve in females. In the States of this country the age of consent varies, being regulated by local statutes. In some States it is twenty-one in males, and eighteen in females. In others, as in Michigan, it is eighteen in males, and sixteen in females.<sup>6</sup>

The want of mental capacity is also an impediment to marriage. This is naturally true, from the fact that the basis of marriage is the assent of the parties; that is, the union must be a voluntary one. Where either party is insane at the time the marriage

4. See Smith Elem. L. 144, 145; 26 Cyc. 845.

5. See Smith Elem. L. 145; 26 Cyc. 848.

6. See Smith Elem. L. 145; 26 Cyc. 842.

contract is entered into, this assent is impossible. But if, although the ordinary condition of the party is that of insanity, the marriage is entered into during a lucid interval, when he is able to give his assent intelligently, it is perfectly valid. On the other hand, if the person is ordinarily sane, but enters into the contract while temporarily insane, the marriage is invalid. Furthermore, if either of the parties was at the time so drunk as to be incapable of giving an intelligent assent, the marriage is also invalid.<sup>7</sup>

The physical incapacity which will invalidate a marriage is called impotency. It is the irremediable inability to perform sexual intercourse. The general health of the person will have no effect, unless it takes the form of impotency. This incapacity must exist at the time of the marriage in order to invalidate it.<sup>8</sup>

In the absence of a statutory provision a difference in race or color is not an impediment to marriage, but in some of the southern and western States there are statutes prohibiting and declaring void intermarriage between white persons and negroes, or between white persons and Indians or Chinese, and such statutes have been held to be constitutional.<sup>9</sup> Such an intermarriage is known as "miscegenation,"<sup>10</sup> and in some States is made a crime.

A marriage may, by reason of an impediment, be absolutely void, so as to give rise to no rights or liabilities, the effect being the same as if no marriage at all had been entered into; or, on the other hand, it may be merely voidable, that is, valid for civil purposes until its nullity has been judicially pronounced by a competent court. In all jurisdictions a prior valid and existing marriage renders the second marriage absolutely void, and no decree of nullity is necessary. The same is true as to prohibited marriages between white persons and negroes. As to the other impediments above mentioned there is some difference of opinion and conflict of authority, and the rules vary in the different States. Generally, however, the marriages are voidable merely, and not void.<sup>11</sup>

**c. The Contract of Marriage.** By the contract of marriage is meant the agreement by which the marriage relation is entered upon. It should be distinguished carefully from the contract to marry at some future time. The former results immediately in the marriage relation. The latter is merely an executory agreement, from which no modifications of status result.<sup>12</sup> This preliminary contract is quite different from the contract of marriage, both in the rules regulating the capacity of the parties who enter

7. See Smith Elem. L. 145; 26 Cyc. 843.

8. See Smith Elem. L. 146; 26 Cyc. 844.

9. See 26 Cyc. 846.

10. See 27 Cyc. 798.

11. See 26 Cyc. 842, 863.

12. See Smith Elem. L. 146; 5 Cyc. 997; 26 Cyc. 825 *et seq.*

upon it, and in its results. In order that a person may make a binding promise to marry at a future time, he must, in this country, be twenty-one years of age. It is, in this and in all other respects, subject to the general law of contracts, as has already been explained. We have seen, however, that in order to enter upon a valid contract of marriage it is only necessary that the parties shall have arrived at the age of consent, which is usually less than twenty-one.<sup>13</sup>

In the results these two contracts also differ widely. The contract of marriage results at once in the marriage relation, with all its varying responsibilities. The contract to marry results in no such relation, but in obligations similar to those arising in ordinary cases of contract. If the promise of either party is not fulfilled, the injured person may simply recover damages for the breach in an action at law.<sup>14</sup>

At common law no particular ceremony or formal solemnization is necessary to constitute a valid marriage. All that is required is that there shall be an actual and mutual agreement to enter into the marriage relation, permanent and exclusive of all others, by persons capable of marrying, consummated by their cohabitation as man and wife or their mutual assumption openly of marital duties and obligations. This is called a marriage contract *per verba de præsenti*—that is, by words of present promise, and such a marriage has repeatedly been recognized as valid in this country.<sup>15</sup>

A formal marriage ceremony is prescribed by statute in most of our states, as well as in England, and a license is often required; but it is usually held that these statutes are merely directory, and that a common-law marriage will still be valid, unless expressly declared void by the statute. In some states, however, the law is so framed that no valid marriage can be contracted except in the manner and with the formalities prescribed.<sup>16</sup>

In any case, to constitute a valid marriage, it must be entered into with the consent and agreement of both parties freely and intelligently given. A mock marriage entered into merely in jest is a nullity.<sup>17</sup>

**§ 153. Persons of Spouses as Affected by Coverture — a. In General.** At the common law the result of marriage was that the legal existence of the wife became merged into that of the husband; and, in general, it may be said that the husband assumed control over the wife and her property in such a way as to leave

13. See Smith Elem. L. 146; and *supra*, § 152, b.

14. See Smith Elem. L. 146, 147; 5 Cyc. 997.

15. See 26 Cyc. 837-840.

16. See 26 Cyc. 840.

17. See 26 Cyc. 832.

her in a position little better than that of a slave of the higher order. "By marriage," says Blackstone, "the husband and wife are one person in law. The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything; and is therefore called, in our French law, a *feme covert*, *fœmina viro co-operta*; is said to be *covert baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle of a union of person in husband and wife depend almost all the legal rights, duties, and disabilities that either of them acquire by the marriage."<sup>18</sup>

Beginning over half a century ago, however, most of the states have passed statutes the object of which is to release married women, to a greater or less extent, from the disabilities imposed upon them by the common law by virtue of their marriage. These statutes are generally known as the "Married Women's Acts."<sup>19</sup> Except so far as the statutes have changed the law, and they vary greatly in the different states, most of the common-law incidents of the theoretical unity of husband and wife still exist.

b. *Cohabitation and Intercourse.* Marriage mutually entitles the husband and wife to cohabitation and intercourse, and, although in this country there is no way in which this right can be judicially enforced, it is the basis of many of the personal rights of the spouses. In England it was enforced in a suit for restitution of conjugal rights.<sup>20</sup>

c. *Obedience — Domicile — Chastisement — Restraint.* By virtue of his position as the head of the family, the husband still controls, to a limited extent, the actions of his wife, and she owes him the duty of reasonable obedience. He has the right to regulate the household, its expenses, and its visitors, and to exercise general control of the family management.<sup>21</sup> He also has a right to fix or to change the family domicile, and refusal of his wife to follow him, without sufficient excuse, will amount to desertion.<sup>22</sup>

At the present time a husband has no right to chastise his wife; nor has he any right to restrain her of her liberty, except where restraint is necessary either: (1) To prevent her from committing a crime; (2) to prevent her from committing adultery; (3) perhaps to prevent her from committing a tort for which he, as her

18. 1 Blackstone Comm. 442. And see Smith Elem. L. 147.

19. See 21 Cyc. 1144.

20. See 21 Cyc. 1148; Tiffany Pers. & Dom. Rel. 48.

21. See 21 Cyc. 1147.

22. See 21 Cyc. 1150; Tiffany Pers. & Dom. Rel. 53. See also *supra*, § 61.

husband, would be liable; and (3) perhaps to prevent her interference with his parental authority over his children.<sup>23</sup>

**d. Services — Support and Protection.** A husband is entitled to his wife's services at common law and in many of the States in this country.<sup>24</sup> And in return for the performance of her duties by the wife, the husband is under a legal duty to support and protect her.<sup>25</sup> If he fails to provide her with the necessities of life, she may purchase them in his name, and he will be compelled to pay for them.<sup>26</sup> If a husband deserts his wife without just cause, she may in most states sue for a divorce.<sup>27</sup> In addition to this there are statutes in many states rendering him liable to a criminal prosecution for abandonment.<sup>28</sup> A deserted wife may also sue for maintenance.<sup>29</sup>

**e. Torts of Married Women.** At common law a husband, during coverture, is liable for the torts committed by his wife, either before or during coverture; but this liability ceases when the coverture is determined by the death of either party or by a divorce.<sup>30</sup>

The rules governing a wife's liability for her own torts are these: (1) She is liable, jointly with her husband during coverture, and solely after his death or a divorce, (a) for torts committed in his absence, whether committed by his direction or command or not; and (b) for torts committed in his presence, but not by his direction or command, express or implied. (2) She is not liable at all for torts committed in his presence, and by his direction or command, but is excused on the ground of coercion. (3) Torts committed by a wife in her husband's actual or constructive presence are presumed to have been committed by his direction or command; but this presumption is *prima facie* only, and may be rebutted. (4) Where a married woman's tort is so connected with an attempted contract by her that to hold her liable therefor would be to recognize the contract, which, as we shall hereafter see, is at common law absolutely void for want of capacity to contract, neither she nor her husband is liable at common law.<sup>31</sup>

These rules of the common law have been greatly modified by modern statutes, in most jurisdictions, removing the disabilities of married women, and by those taking from the husband the rights which the common law gave him in respect to his wife's property. Thus: (1) In some states a husband is no longer liable for the torts of his wife; unless he participated in their com-

23. See 1 Blackstone Comm. 445; 21 Cyc. 1150, 1151; Tiffany Pers. & Dom. Rel. 50.

24. See 21 Cyc. 1153 *et seq.*

25. See 21 Cyc. 1151 *et seq.*

26. See *infra*, § 155, d.

27. See *infra*, § 158.

28. See 21 Cyc. 1611. It was not a crime at common law.

29. See 21 Cyc. 1598.

30. See 21 Cyc. 1350; Tiffany Pers. & Dom. Rel. 59.

31. See 21 Cyc. 1350-1353; Tiffany Pers. & Dom. Rel. 69.



mission. (2) In other states he is liable for her personal torts like assault or slander, but not for torts committed in the control of her separate property. (3) Where married women have by statute been given the power to contract, they may be liable for torts connected with their contracts.<sup>32</sup>

**f. Torts as Between Husband and Wife.** By reason of the unity of husband and wife at common law and the inability of either to sue the other, and for other reasons, neither of them is liable to the other at common law, either during coverture or after divorce, for wrongful acts or torts, whether the injury be to person or property, committed during coverture. The husband in such case could sue third persons who assisted the wife, but the wife could not sue third persons who assisted the husband. In some states this is changed by statute.<sup>33</sup>

**g. Torts Against Married Women.** When a tort is committed against a married woman it generally results in injury both to her and to her husband, and for these injuries the right of action is different.

*For the injury to the wife*, as for her mental and physical suffering, damages may, during coverture, be recovered at common law in a joint action by the husband and wife, and only in such an action. At common law, as we shall see, marriage confers upon the husband an absolute right to all of his wife's personal property in possession, and to her choses in action if he reduces them to possession during coverture; and claims of the wife for damages growing out of torts committed by third persons against her person or character, such as assault and battery, negligent personal injury, libel, slander, etc., are choses in action within this rule. As stated before, the action during coverture can only be brought by the husband and wife jointly. If she dies, the cause of action abates or ceases, and the husband cannot afterward bring or continue an action. If he dies, however, the wife may sue or continue an action alone.<sup>34</sup> By statute in most states, the common law has been changed, so that the wife may now sue alone and recover for the injury to herself for her own benefit.<sup>35</sup>

*For the injury to the husband*, as for loss of the wife's society and services and for his disbursements, damages may be recovered at common law by the husband suing alone, and only in such an action. This is called an action *per quod consortium amisit*.<sup>36</sup> In other words, at common law damages for injuries personal to the

32. See 21 Cyc. 1352; Tiffany Pers. & Dom. Rel. 59, 65.

33. See 21 Cyc. 1002; Tiffany Pers. & Dom. Rel. 68.

34. See 21 Cyc. 1525 *et seq.*; Tiffany Pers. & Dom. Rel. 70.

35. See 21 Cyc. 1525 *et seq.*

36. Meaning, "Whereby he has lost her society."

wife must be recovered in the joint action, and damages for the injury to the husband must be recovered by him alone. In some states this has been changed by statute, so as to allow all damages, whether to the husband or to the wife, to be recovered in a joint action. The action or right of action for the husband's injury does not abate or cease on the wife's death.<sup>37</sup>

**h. Enticing, Harboring, and Alienation of Affection.** Since a husband is entitled to his wife's society and services, he has a right of action for damages against any one who alienates her affections from him, or who deprives him of her society or services by enticing her to leave him, or by harboring her. But a person who harbors a wife, not from improper motives, but from motives of humanity, as where she has been forced to leave her husband from fear of bodily harm, is not liable. Nor are parents liable for advising a daughter to leave her husband, or for harboring her, where they act from proper motives; and in this class of cases proper motives will be presumed until the contrary appears.<sup>38</sup>

**Action by Wife.**—In some jurisdictions it has been held that neither at common law, nor under the modern statutes allowing married women to sue, can a wife maintain an action against another for enticing away her husband or alienating his affections. By the weight of modern authority, however, since the loss of services is not necessary to the action, and the right to each other's society and comfort is reciprocal, a wife may maintain such an action, at least where her common-law disability to sue alone has been removed by statute; and it has been held that the action will lie even at common law and in the absence of such a statute.<sup>39</sup>

**i. Criminal Conversation.** An action for damages, known as an action for "criminal conversation," can be maintained by a husband against one who has intercourse with his wife without his consent, whether with or without her consent.<sup>40</sup> At common law a wife has no such right of action against a woman who has intercourse with her husband, but it is sometimes given by statute.<sup>41</sup>

**j. Crimes.** As we have seen, a married woman who commits a crime in the presence of her husband is, with certain exceptions, presumed to act under his coercion, and is not responsible unless the presumption is rebutted, in which case she is responsible.<sup>42</sup> Generally, husband and wife are criminally liable for criminal acts committed against each other. Because of their relation, however,

37. See 21 Cyc. 1525 *et seq.*; Tiffany Pers. & Dom. Rel. 70, 72.

38. See 21 Cyc. 1617 *et seq.*; Tiffany Pers. & Dom. Rel. 74.

39. Tiffany Pers. & Dom. Rel. 78; 21 Cyc. 1617.

40. See 21 Cyc. 1626 *et seq.*; Tiffany Pers. & Dom. Rel. 79.

41. See 21 Cyc. 1627.

42. See *supra*, § 89, j.

there are certain crimes which they cannot commit. Thus at common law neither can commit larceny, burglary, or arson against the other, nor is one who assists the wife guilty of larceny, except where the wife is an adulteress or elopes for the purpose of adultery.<sup>43</sup> Because of his marital rights a husband cannot commit a rape upon his wife;<sup>44</sup> nor, since they are one person in law, can they, between themselves only, be guilty of conspiracy, which requires at least two persons.<sup>45</sup>

**§ 154. Rights in Property as Affected by Coverture — a. Wife's Earnings.** At common law the husband is entitled absolutely to the earnings of his wife. He takes all the proceeds of her industry, whether it is in the form of money paid her or other property. The rule applies, not only to earnings which have been actually received by him or by her, but also to earnings which are due. In most states, however, this rule has been changed by statute.<sup>46</sup>

**b. Wife's Personal Property in Possession.** At common law all of the wife's personal property in possession, including money, goods, and chattels of every description, vests exclusively in her husband, without any act on his part. He may dispose of it as he sees fit; it may be seized by his creditors and subjected to the payment of his debts; and on his death it will go to his personal representatives, even though the wife may survive him. If the wife's interest is that of a tenant in common, the husband assumes the same relation in her place. This is true as to personalty owned by the wife at the time of the marriage and personalty acquired during coverture, and as to personalty in her actual possession and personalty in the actual possession of some third person not holding adversely. The rule does not apply, however, to the wife's paraphernalia, by which is meant such articles of wearing apparel, personal ornament, or convenience as are suitable to her rank and condition. These belong to the husband, like other personalty in possession; but if they are undisposed of by him, they belong to the wife on his death.<sup>47</sup>

**c. Wife's Choses in Action.** A husband is entitled to his wife's choses in action,<sup>48</sup> if he reduces them to possession during cover-

43. See 3 Cyc. 992; 21 Cyc. 1303; 25 Cyc. 31, 32; Tiffany Pers. & Dom. Rel. 57. This, however, has been somewhat changed by statute.

44. See *supra*, § 88, b, "Rape."

45. See 8 Cyc. 620.

46. See 21 Cyc. 1153; Tiffany Pers. & Dom. Rel. 83.

47. See 21 Cyc. 1157, 1169, 1172; Tiffany Pers. & Dom. Rel. 85.

48. A chose in action has been defined as a right to be asserted by ac-

tion at law; but the term may include a right to be asserted in equity. It includes all claims arising from contract, duty, or wrong, to enforce which resort may be had either to an action at law or to a suit in equity. Stocks and bonds, bills of exchange and promissory notes, and other debts owing to the wife, claims for damages for personal injuries, slander, or other torts against the wife, checks and certificates of de-

ture, but not otherwise. If he fails to reduce them to possession during coverture, and dies before his wife or is divorced, they remain her property and pass to her representatives. If she dies first, and before they have been reduced to possession, they pass to her representatives. To reduce them to possession he must exercise some positive act of ownership over them, with the intention of converting them to his own use. The intention to take possession, without actually doing so, is not sufficient; nor is the actual taking of possession sufficient, if there is no intent to convert to his own use.<sup>49</sup> In most of the states this rule as to choses in action is changed by the modern statutes.<sup>50</sup>

**d. Wife's Equity to a Settlement.** Whenever it was necessary for the husband, or one claiming in his right, as an assignee, for instance, to ask the aid of a court of equity to reduce the wife's personalty to possession, the court, in pursuance of the principle that he who seeks equity must do equity,<sup>51</sup> required the husband to make a suitable settlement for the maintenance of the wife and children, unless they were already sufficiently provided for. This right of the wife is called her "equity to a settlement," or "equity."<sup>52</sup>

**e. Wife's Chattels Real.** The husband has the enjoyment of his wife's chattels real, that is, leases and terms for years, during his life, with the power to dispose of and encumber them, and they are liable for his debts. If they are undisposed of on his death, they go to the wife. On her death they go to him.<sup>53</sup>

**f. Wife's Estates of Inheritance.** Where, at the time of marriage or during coverture, a woman is seized of an estate of inheritance in land, her husband is entitled to its usufruct during coverture.<sup>54</sup> If there is issue of the marriage born alive capable of inheriting her estate, the husband's estate continues as tenant by the curtesy initiate, as it is called, during the wife's life, and as tenant by the curtesy consummate after her death for the remainder of his life.<sup>55</sup> The husband's estate or right extends only to the use of the land, and to the rents, issues, and profits. He may alienate the land, so as to convey his interest, or encumber the same to the extent of his estate therein, and his interest is liable for his debts, and may be taken and sold on execution.<sup>56</sup> The common-law rights

posit, are all choses in action within this rule. Tiffany Pers. & Dom. Rel. 89. And see *infra*, § 223.

49. See 21 Cyc. 1175 *et seq.*; Tiffany Pers. & Dom. Rel. 88.

50. See 21 Cyc. 1364 *et seq.*

51. See *supra*, § 37.

52. See 21 Cyc. 1189; Tiffany Pers. & Dom. Rel. 92.

53. See 21 Cyc. 1163; Tiffany

Pers. & Dom. Rel. 96. As to what are chattels real see *infra*, § 222.

54. See 21 Cyc. 1163, 1166; Tiffany Pers. & Dom. Rel. 97.

55. See 12 Cyc. 1002; Tiffany Pers. & Dom. Rel. 97. And see *infra*, § 199, c.

56. See 21 Cyc. 1165, 1167; Tiffany Pers. & Dom. Rel. 98.

of a husband in his wife's estates of inheritance, except his curtesy, have been in most jurisdictions abolished by statute; and in some States his right as tenant by the curtesy has been either abolished or materially changed.<sup>57</sup>

**g. Wife's Estates for Life.** The husband, in right of his wife, becomes seized of her life-estates, whether they are for her own life or for the life of another, and he is entitled to the profits thereof.<sup>58</sup>

**h. Property Acquired by Wife as Sole Trader.** In equity, by agreement with her husband, a married woman may become a sole trader and carry on a trade or business for her separate use, in which case she will be entitled in equity to hold the stock in trade and profits as her separate property.<sup>59</sup>

**i. Wife's Equitable Separate Estate.** To mitigate the hardships arising from the rules of the common law giving to the husband rights in his wife's property, equity has recognized, or rather created, the doctrine by which a married woman may acquire and hold separate estate, both real and personal, independently of her husband, and free from his control. For this purpose equity treats married women, in relation to their separate property, as if sole. This doctrine is a creature of equity only, and was unknown to the common law. The doctrine applies only to property held to the wife's separate use by the terms of some agreement or conveyance, as under antenuptial or post-nuptial agreements with her husband, gifts from her husband or strangers, or conveyances, devises, or bequests.<sup>60</sup>

**j. Wife's Statutory Separate Estate.** The common law, in so far as it affects the property of the wife, has been very greatly modified by modern statutes, commonly known as the "Married Women's Acts." In no State is the common law now in force to its full extent. The statutes vary so much in the different States that they can be here referred to only in a general way. Their result may be stated as follows: (1) Perhaps in all the States the real estate owned by a woman at the time of her marriage remains her separate property after marriage. (2) In many States real estate acquired by her after marriage, by devise, descent, or purchase becomes and remains her separate property. (3) In some States real estate acquired in any way becomes and remains her separate property. (4) In most States the personal property owned by a woman at the time of her marriage remains her separate property after marriage. (5) In most States personal property acquired by her

57. See 12 Cyc. 1021; 21 Cyc. 1364, 1369.

58. See 21 Cyc. 1158; Tiffany Pers. & Dom. Rel. 99.

59. See 21 Cyc. 1333; Tiffany Pers. & Dom. Rel. 100.

60. See 21 Cyc. 1357; Tiffany Pers. & Dom. Rel. 131.

after marriage, by bequest or descent, and in many States by purchase, becomes and remains her separate property.<sup>61</sup>

**k. Rights of Wife in Husband's Property.** A husband's legal existence is not affected by the marriage, and therefore property and property rights owned or acquired by him are not during his life affected thereby, although certain rights therein are given to the wife on his death, and in some States, by statute, the doctrine of community property has been adopted from the civil law.<sup>62</sup> At the death of the husband the wife is entitled at common law, or under an English statute, or similar statutes in this country, as follows: (1) Corresponding to the husband's right by curtesy,<sup>63</sup> she is entitled as her dower, at common law, to one third of all the lands of which the husband was seized at any time during coverture, and which her issue might have inherited. At common law this is only a life-estate.<sup>64</sup> (2) She is also entitled as her thirds, under the Statute of 22 and 23 Car. II, c. 10, and similar statutes in many of our States, to one third of his personal property, if he died leaving children or their issue living; otherwise to one-half.<sup>65</sup> In some States, by statute, her rights are somewhat different.<sup>66</sup>

**1. Estates by the Entirety.** When land is conveyed or devised to husband and wife jointly, they take, by virtue of their relation, not as joint tenants or tenants in common, as in the case of other persons, but as tenants by the entirety, by which is meant that each is seized of the whole, and on the death of one the land goes to the survivor. This doctrine, however, has been abolished in many States by statute.<sup>67</sup>

**m. Community Property.** In some States, by statute, real or personal property acquired by husband and wife, or by either of them, during coverture, otherwise than in certain excepted ways specified in the statute, is declared to be common or community property. These statutes create a kind of partnership between husband and wife in regard to property. The community property doctrine was unknown to the common law. It had its origin in the civil law. It was adopted by statute in Louisiana, Texas, California, Washington, and a few other western and southwestern States, from the French, Spanish, or Mexican law, and now prevails in those States. The general scheme of these statutes is the same, but they vary widely in details.<sup>68</sup>

61. See 21 Cyc. 1364 *et seq.*; Tiffany Pers. & Dom. Rel. 138.

62. See *infra*, § 154, m.

63. See *supra*, § 154, f.

64. See 14 Cyc. 880; and *infra*, § 199, d.

65. See 14 Cyc. 63; Tiffany Pers. & Dom. Rel. 102.

66. See 14 Cyc. 63.

67. See 21 Cyc. 66; Tiffany Pers. & Dom. Rel. 103; and *infra*, § 201.

68. See 21 Cyc. 1633; Tiffany Pers. & Dom. Rel. 104.

§ 155. **Contracts, Conveyances, etc., and Quasi-Contractual Obligations — a. Contracts of Married Women.** As a result of the common-law principle that the legal existence of a woman is lost during coverture, the attempted contracts of a married woman are, with few exceptions, absolutely void. She cannot, during coverture, enter into a contract that will bind her personally, either during coverture or after her coverture has been determined by death or divorce. She has no power or capacity to contract. Her attempted contracts are not merely voidable, but absolutely void; and the rule is the same at law and in equity.<sup>69</sup>

The exceptions are as follows: (1) She could contract and sue and be sued as a *feme sole*, even at common law, when her husband had been banished, had abjured the realm, was a non-resident alien, or had been transported or was civilly dead.<sup>70</sup> Other exceptions based on this principle have been prescribed by statute.<sup>71</sup> (2) In equity, with the consent of her husband, a married woman may carry on a separate trade or business, and contract with reference thereto.<sup>72</sup> (3) In equity she may contract with reference to her separate estate, so as to bind it, but not so as to bind herself personally. The court of chancery in England having established the doctrine of the wife's separate property, it was held to follow that a married woman could not claim the protection of equity in the enjoyment and disposition of her property without being subject to the burdens incident to ownership.<sup>73</sup> (4) Under modern statutes a married woman's disability to contract has been removed to a greater or less extent in the different States. In many States she may, by statute, contract to the same extent as if she were unmarried, but in other States her capacity is limited.<sup>74</sup>

**b. Conveyances, Sales, and Gifts by Wife.** At common law a married woman could not, by conveyance, either transfer her own real property, or bar her right to dower in the real property of her husband.<sup>75</sup> In equity, however, in most jurisdictions, it is held that she has the power to convey or otherwise dispose of her equi-

69. See 21 Cyc. 1310; Tiffany Pers. & Dom. Rel. 107.

70. The wife of a man who was civilly dead by reason of his being under conviction of a felony had the same capacity to contract as a *feme sole*. The old common-law doctrine of civil death from conviction of a felony is not recognized in this country; but there are, in some States, statutes declaring that a man who is under a sentence of imprisonment in the penitentiary for life shall be deemed civilly dead; and in such a

case his wife would no doubt be deemed a *feme sole*, even in the absence of an express provision to that effect in the statute. See 21 Cyc. 1307; Tiffany Pers. & Dom. Rel. 109.

71. See 21 Cyc. 1307.

72. See 21 Cyc. 1333 *et seq.*; Tiffany Pers. & Dom. Rel. 107, 111.

73. See 21 Cyc. 1450 *et seq.*; Tiffany Pers. & Dom. Rel. 135.

74. See 21 Cyc. 1450, 1452 *et seq.*; Tiffany Pers. & Dom. Rel. 143.

75. See 21 Cyc. 1328; Tiffany Pers. & Dom. Rel. 113.

table separate estate, real or personal, unless prohibited by the instrument creating it; and in all jurisdictions she has such power if it is conferred by such instrument.<sup>76</sup> Under modern statutes a married woman generally has the power to dispose of her separate property, real or personal; but she has no such power unless it is expressly or impliedly given her by the statute. Although some courts hold otherwise in the case of personal property, the general rule is that a statute merely giving the right to hold and enjoy, or the *jus tenendi*, does not include the *jus disponendi*, or the power of disposition.<sup>77</sup> Statutes have very generally given married women the power to convey their own real estate, and to bar their right to dower in the real estate of her husband, by joining with him in conveyances. Certain formalities in the execution of the conveyance are usually required, and these must be strictly observed.<sup>78</sup>

**c. Contracts by Wife as Husband's Agent.** The wife may, when expressly or impliedly authorized by the husband, act as his agent in the making of contracts for him; and she may become his agent by estoppel or ratification, as in other cases of agency, as explained in a previous chapter.<sup>79</sup>

**d. Husband's Liability for Necessaries Furnished Wife.** The husband's liability for necessaries purchased by his wife on his credit, where the wife is supported by him, depends upon the existence of agency in fact. If they are living together, the fact of cohabitation raises a presumption of authority in fact; but this presumption may be rebutted. If they are living apart, the presumption is against her authority to bind him, and the burden is on the person dealing with her to show such authority.<sup>80</sup>

As a rule, where a husband fails to provide for his wife, she becomes his agent by operation of law to purchase necessaries on his credit, but the rule is subject to qualification: (1) He is liable, under such circumstances, (a) where he lives with his wife, or (b) where they live apart, either through his fault or by agreement, and without fault on her part. (2) He is not liable (a) where she leaves him without cause, unless she offers to return and he refuses to receive her; (b) where the credit is given to her, and not to him; (c) where she has a sufficient income; or (d) where she has agreed to accept a certain amount from him, and he pays it.<sup>81</sup> Under the term "necessaries" are included food, clothing, lodgings, ordinary

76. See 21 Cyc. 1496 *et seq.*; Tiffany Pers. & Dom. Rel. 113, 133.

77. See 21 Cyc. 1498 *et seq.*; Tiffany Pers. & Dom. Rel. 113, 142.

78. See 21 Cyc. 1330.

79. See 21 Cyc. 1234; and *supra*, §§ 145, 147.

80. See 21 Cyc. 1234; Tiffany Pers. & Dom. Rel. 118.

81. See 21 Cyc. 1215 *et seq.*; Tiffany Pers. & Dom. Rel. 118.



household supplies, expenses of sickness, and articles of domestic comfort suitable to and reasonable within the rank and means of the husband, and the husband's liability is not limited to the bare means of subsistence.<sup>82</sup>

**e. Husband's Liability for Wife's Funeral Expenses.** Analogous to the husband's liability for necessities purchased by his wife on his credit, where he neglects to provide for her, is the liability imposed upon him by law to pay her necessary funeral expenses. It is his duty to give her burial, and where he neglects it, he will be liable for the necessary funeral expenses to any one who pays them.<sup>83</sup>

**f. Husband's Liability for Wife's Debts.** The husband becomes liable on marriage for his wife's antenuptial debts; but his liability lasts only during coverture, after which the liability of the wife revives. This liability has been very generally abolished by statute.<sup>84</sup> A husband is also liable at common law for the debts of his wife's separate business, when it is conducted with his express consent, or where his consent may be implied, as where he takes a part in its management or shares in its profits; but he is not liable if it is conducted without his consent, express or implied.<sup>85</sup>

**§ 156. Antenuptial and Post-Nuptial Settlements.** An antenuptial settlement or marriage settlement is an agreement entered into before marriage and in consideration thereof, between an intended husband and wife, or between them and third persons, by which the enjoyment or devolution of property is regulated. The marriage settlement may determine the rights which the husband and wife shall have in his or her own, or in each other's, property; but, as a rule, it cannot otherwise vary the rights and obligations of husband and wife, arising from the marriage relation.<sup>86</sup> Marriage is a sufficient consideration to support an antenuptial settlement in favor of: (1) The husband and wife and their issue, or the issue of a former marriage; and (2) collateral relatives, where it is clear that it was intended to provide for them; but (3) not in favor of mere strangers. It is a sufficient consideration as against (1) the settlor; and (2) the settlor's creditors, in favor of an innocent beneficiary, although the settlor was insolvent and intended to defraud his creditors; but (3) not as against creditors if the beneficiary participated in the fraudulent intent or knew of it.<sup>87</sup> Under the statute of frauds, an agreement in considera-

<sup>82</sup>. See 21 Cyc. 1219.

<sup>83</sup>. See 21 Cyc. 1233; Tiffany Pers. & Dom. Rel. 127.

<sup>84</sup>. See 21 Cyc. 1212; Tiffany Pers. & Dom. Rel. 128.

<sup>85</sup>. See 21 Cyc. 1339; Tiffany Pers. & Dom. Rel. 111.

<sup>86</sup>. See 21 Cyc. 1241, 1243; Tiffany Pers. & Dom. Rel. 150.

<sup>87</sup>. See 21 Cyc. 1246; Tiffany Pers. & Dom. Rel. 152.

tion of marriage must be evidenced by writing, or it cannot be proved or recognized by the courts.<sup>88</sup>

The term "settlement" is ordinarily applied to agreements entered into before marriage, and in contemplation and consideration thereof, by which the enjoyment and devolution of property is regulated. In its broadest sense, however, the term applies also to settlements or agreements made after marriage. In the former case they are called "antenuptial settlements," and in the latter case they are called "post-nuptial settlements." At common law, contracts, gifts, and conveyances made between husband and wife directly, and without the intervention of trustees or third persons, are void by reason of the common-law doctrine of unity of husband and wife. In equity the common-law rule does not apply to the full extent, but: (1) Contracts between husband and wife will be supported, where they would be good at common law if made with trustees for the wife. (2) Gifts by the husband to the wife are good as between the parties, where there is an irrevocable gift to some person as trustee for the wife, or where the husband divests himself of the property, and agrees to hold it as trustee for the wife. (3) Conveyances by the husband directly to the wife are good as between the parties when they are a just and reasonable provision for the wife.<sup>89</sup> The consideration of marriage supports a settlement made after marriage, if in pursuance of a valid antenuptial agreement in compliance with the statute of frauds.<sup>90</sup>

Under the statute of 13 Eliz. c. 5, and similar statutes in this country, declaring conveyances of real estate and transfers of personal property void when made with intent to defraud creditors, post-nuptial voluntary settlements, or gifts and conveyances between husband and wife, where the husband is indebted, are held in some States to be conclusively fraudulent and void as against existing creditors. In England and in most States, however, they are held to be only *prima facie* fraudulent and void. Under the statute of 27 Eliz. c. 4, and similar statutes which have been enacted in this country declaring void as against subsequent purchasers conveyances made with the intention of defeating them, post-nuptial and voluntary conveyances from husband to wife are held in England to be conclusively fraudulent and void as against subsequent purchasers; but in this country they are held merely *prima facie* fraudulent and void.<sup>91</sup>

<sup>88</sup>. See 21 Cyc. 1244; Tiffany Pers. & Dom. Rel. 158. See *supra*, § 129.

<sup>89</sup>. See 21 Cyc. 1254; Tiffany Pers. & Dom. Rel. 160.

<sup>90</sup>. See 21 Cyc. 1255.

<sup>91</sup>. Tiffany Pers. & Dom. Rel. 164; 21 Cyc. 1256.

§ 157. **Separation Agreements.** Agreements of separation between husband and wife are valid, if the separation has actually taken place at the time of the agreement or immediately follows it; but it is otherwise if a future separation is contemplated. The agreement to live separately will not be enforced, but only the provisions for maintenance, and other collateral engagements. If the parties live together again, the agreement is rescinded, and the parties are restored to their full marital rights.<sup>92</sup>

§ 158. **Divorce or Judicial Separation.** Divorce is the legal separation of husband and wife by the judgment of a court. There are two kinds: (1) It may dissolve the marriage, in which case it is called a divorce *a vinculo matrimonii* — meaning “from the bond of marriage”; also commonly referred to as an absolute divorce. (2) Or it may suspend the effect of the marriage only in so far as cohabitation is concerned, in which case it is called a divorce *a mensa et thoro* — meaning “from bed and board.” The effect of this is not to put an end to the marriage relation itself, but rather to do away with the principal obligations incident thereto. It is also known as a judicial separation, because such a divorce provides that the parties shall no longer cohabit.<sup>93</sup>

In this country, jurisdiction of the courts to entertain a suit for divorce is entirely statutory; but when once conferred, it is generally exercised as in the English ecclesiastical courts.<sup>94</sup> In the absence of constitutional restrictions, the legislature of a State has the power to grant divorces by special act; and such an act is not within the constitutional prohibition against laws impairing the obligation of contracts, marriage not being a contract within the meaning of that prohibition. This power was exercised by parliament in England and has in a number of cases been exercised by the State legislatures in this country.<sup>95</sup>

The grounds which will justify the court in granting a divorce are usually statutory. In the State of South Carolina divorces are not granted for any cause. In the State of New York absolute divorces are granted in cases of adultery, but for no other reason. The other States are much more liberal, recognizing various kinds of misconduct as proper grounds. In most of the States extreme cruelty, adultery, desertion for a certain prescribed time, and habitual drunkenness are considered sufficient. In some States divorces are also granted for conviction of crime and imprisonment under certain circumstances; for incurable insanity; for non-support

92. See 9 Cyc. 519; 21 Cyc. 1592 *et seq.*; Tiffany Pers. & Dom. Rel. 168.

93. See 14 Cyc. 573 *et seq.*; Tiffany Pers. Dom. Rel. 171.

94. See 14 Cyc. 581; Tiffany Pers. & Dom. Rel. 172.

95. See 14 Cyc. 574; Tiffany Pers. & Dom. Rel. 208.

under certain circumstances; where the other party has obtained a divorce in another State; for causes rendering marriage void or voidable; and even for the "habitual indulgence of a violent and ungovernable temper."<sup>96</sup>

The principal defenses in suits for divorce, aside from the non-existence of the ground alleged, are: (1) connivance, (2) collusion, (3) condonation, and (4) recrimination. Connivance is the corrupt consent by one spouse to an offense by the other, and will bar a suit for such offense.<sup>97</sup> Collusion is any agreement between the parties whereby they seek to obtain a divorce by an imposition on the court, and is ground for refusing relief.<sup>98</sup> Condonation is the forgiveness of a marital offense constituting a ground for divorce, and bars the right to a divorce.<sup>99</sup> Recrimination is a countercharge in a suit for divorce that the complainant has been guilty of an offense constituting a ground for divorce. Adultery is universally, and any conduct which is a ground for divorce is in most States, a complete bar to a divorce when set up in recrimination.<sup>1</sup>

## B. SAME — PARENT AND CHILD

§ 159. **Legitimacy of Children.** The relation of parent and child springs naturally from that of husband and wife. The mutual rights and duties of the parties to this relation depend largely upon whether the child is legitimate or illegitimate. A legitimate child is one who is born in lawful wedlock or within a competent time afterward, and is not the result of adulterous intercourse. An illegitimate child is one who is not born in lawful wedlock or within a competent time afterward, or who is the offspring of an act of adultery.<sup>2</sup>

There is a strong presumption that the child of a married woman is legitimate, but this presumption is one of fact, not of law, and may be rebutted by clear and convincing evidence that the husband could not have been the father.<sup>3</sup>

Furthermore, under the statutes of most of our States, as in most other civilized countries, a child who is originally illegitimate

96. See 14 Cyc. 593 *et seq.*; Tiffany Pers. & Dom. Rel. 173 *et seq.*

97. See 14 Cyc. 644; Tiffany Pers. & Dom. Rel. 195.

98. See 14 Cyc. 646; Tiffany Pers. & Dom. Rel. 198.

99. But condonation is on the condition, implied by law when not express, that the wrong-doer shall not again commit that offense, and also that he shall thereafter treat the other with "conjugal kindness"; and a breach of the condition will revive

the original offense as a ground for divorce. Condonation may be by express words, if acted upon; or it may be inferred from conduct alone. See 14 Cyc. 637; Tiffany Pers. & Dom. Rel. 199.

1. See 14 Cyc. 648; Tiffany Pers. & Dom. Rel. 203.

2. See 5 Cyc. 625; Tiffany Pers. & Dom. Rel. 213.

3. See 5 Cyc. 626; Tiffany Pers. & Dom. Rel. 217.

may be made legitimate, either by a subsequent marriage of the parents, or by such subsequent marriage and acknowledgment of the child by the father.<sup>4</sup>

By the weight of authority the legitimacy of a child, not only for the purpose of determining whether he can inherit, but for all other purposes, is to be determined by the law of the place where he was born and the parents were domiciled.<sup>5</sup>

§ 160. **Status of Illegitimate Children.** The natural relation between a parent and his illegitimate children does not, at common law, give rise to those rights and duties which pertain to the legal status of parent and child; but to some extent the law recognizes bastards as children. Thus:

(1) The mother is entitled to the custody and services of her illegitimate child, as against the father or strangers; but if the welfare of the child requires it, the court may award its custody to another. And, subject to the same qualifications, the father is entitled to its custody as against all but the mother.<sup>6</sup>

(2) The child's domicile is determined by that of the mother.<sup>7</sup>

(3) At common law a bastard cannot inherit, either from or through his father or mother or otherwise, and he can have no heir except of his own body. His rights, says Blackstone,<sup>8</sup> "are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody, and sometimes called '*filius nullius*,'<sup>9</sup> sometimes '*filius populi*.'"<sup>10</sup> These harsh rules of the common law, however, have in most States been greatly modified by statute.<sup>11</sup>

(4) At common law the father is under no legal obligation to support his illegitimate child, but now, by statute, he may very generally be compelled to do so.<sup>12</sup> Nor, at common law was there any such liability on the part of the mother, although it seems to be otherwise in this country.<sup>13</sup>

§ 161. **Adoption of Children.** The legal adoption by one person of the child of another, giving him the status of a child by adoption, was unknown to the common law. It was recognized, however, by the Roman or civil law, and exists in many countries on the continent of Europe, which derive their jurisprudence from that law. It was long ago introduced, from the law of France or of Spain into Louisiana and Texas, and more recently, at various times and by different statutes, into most of the other

4. See 5 Cyc. 632.

5. See 5 Cyc. 642; Tiffany Pers. & Dom. Rel. 216.

6. See 5 Cyc. 637; Tiffany Pers. & Dom. Rel. 225.

7. See 14 Cyc. 845.

8. 1 Blackstone Comm. 459.

9. Meaning "the son of nobody."

10. Meaning "a son of the people."

11. See 5 Cyc. 639 *et seq.*

12. See 5 Cyc. 638.

13. See 5 Cyc. 638.

States. Where the artificial relation of parent and child is created by adoption under the statutes, the relation will generally give rise to substantially the same rights, duties, and liabilities as arise out of the natural relation of parent and child.<sup>14</sup>

§ 162. **Duties and Liabilities of Parents — a. Duty to Maintain Child.** In England and in some of our States, by statute, it is made the duty of the parent to maintain his child. In some States it is made a penal offense if he neglects to do so. Whether there is a legal duty on the part of the parent at common law to maintain his minor child, so as to render him liable for necessities furnished the child, is a question upon which the authorities are conflicting. In England and in some of our States it is held that there is only a moral obligation, in the absence of a statute, and that there is no liability for necessities unless there is a promise in fact to pay for them, express or implied. In other States it is held that the obligation is a legal one, and that there is a liability for necessities, in case of non-support by the parent, in the absence of any promise in fact, or else that, if the obligation is merely a moral one, it is nevertheless sufficient to create such a liability.<sup>15</sup>

Primarily, the duty to support and maintain a child rests upon the father, and during his lifetime there is no such duty on the part of the mother; but on the death of the father the duty devolves upon the mother, subject, however, to certain limitations not applicable in the case of the father.<sup>16</sup>

**b. Duty to Educate Child.** Parents, however wealthy, are not under any legal duty to educate their children, although they are under moral duty to do so, if able.<sup>17</sup>

**c. Allowance in Equity out of Child's Estate.** When a parent is unable to support his child and the child has property, equity will make allowances therefrom for his future or past maintenance. An allowance will not be granted, however, if the parent is able to support his child, except where the child's fortune exceeds the parent's, in which case it may be maintained according to its fortune.<sup>18</sup>

**d. Duty to Protect Child.** The law recognizes the duty of a parent to protect his child and will uphold him therein. Thus, a parent may justify an assault and battery, or even a homicide, in the necessary defense of the person of his child.<sup>19</sup>

**e. Contracts by Child as Parent's Agent.** The child, if expressly or impliedly authorized, but not otherwise, may act as his parent's

14. See 1 Cyc. 914 *et seq.*; Tiffany Pers. & Dom. Rel. 221.

15. See 29 Cyc. 1605 *et seq.*; Tiffany Pers. & Dom. Rel. 230.

16. See 29 Cyc. 1606.

17. Tiffany Pers. & Dom. Rel. 238.

18. See Tiffany Pers. & Dom. Rel. 235; 29 Cyc. 1616 *et seq.*

19. Tiffany Pers. & Dom. Rel. 237; 3 Cyc. 1048; 21 Cyc. 826.

agent and bind him by a purchase of goods, or by any other contract; and if the parent allows the child to have an apparent authority he constitutes him his agent by estoppel — that is, he will not be allowed to deny his agency.<sup>20</sup>

**f. Parent's Liability for Child's Torts.** A parent is not liable, merely because of the relation, for the torts or wrongs of his child; but he may be liable for torts committed by the child as his agent or servant, or with his knowledge or acquiescence. There was such a liability under the civil law, but it never was recognized by the common law.<sup>21</sup>

**g. Parent's Liability for Child's Crimes.** The relation of parent and child does not render the parent liable for his child's crimes; although he may become liable, of course, by counseling, aiding, or abetting the child therein.<sup>22</sup>

**§ 163. Rights of Parents and of Children — a. In General.** To enable them to perform their duties, parents have, subject to certain restrictions, (1) the right to correct their children; (2) the right to their custody; and (3) the right to their services and earnings. Blackstone says that these rights are given to parents, partly to enable them to more effectively perform their duty, and partly as a recompense for their care and trouble in discharging it.<sup>23</sup>

**b. Parent's Right to Correct Child.** A parent, or one standing *in loco parentis*, that is, in the place of a parent, may correct and punish his child in a reasonable manner; but if the correction is grossly excessive, either in its nature or extent, or if it is wanton or without cause, he will be guilty of assault and battery and otherwise amenable to the criminal law.<sup>24</sup>

**c. Custody of Children.** At common law, in England, the father, and on his death the mother, was entitled as a matter of course to the custody and control of their minor children, except in case of their gross unfitness. Equity, however, would not allow the right to control as against the well-being of the child. The common-law doctrine has also been modified by statute in England. In this country the courts recognize the parental right of custody in the different jurisdictions, but the prevailing doctrine is that, in awarding the custody of a child, the welfare of the child is

20. See 29 Cyc. 1664; and *supra*, §§ 145, 147.

21. See 29 Cyc. 1665; Tiffany Pers. & Dom. Rel. 239.

22. See 29 Cyc. 1667; and *supra*, § 92.

23. 1 Blackstone Comm. 452.

Kent says: "The rights of parents result from their duties. As they are bound to maintain and educate their

children the law has given them a right to such authority, and, in the support of that authority, a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust. This is the true foundation of parental power." 2 Kent Comm. 203.

24. See 29 Cyc. 1585; Tiffany Pers. & Dom. Rel. 243.

the controlling consideration. The courts consider, not only the fitness of the persons contending for the custody, but the condition and future prospects of the child, and the wishes of the child where it is old enough to decide intelligently.<sup>25</sup>

Where a divorce is granted either to the husband or to the wife, it does not follow as a matter of course that the complainant in the divorce suit is entitled to the custody of the minor children. Here, as in other cases, the best interests of the child will determine its custody.<sup>26</sup>

**d. Parent's Right to Child's Services and Earnings.** The father, and, by the weight of authority, the mother on his death, is entitled to a minor child's services and earnings, while the child lives with and is supported by them, and if he has not been emancipated.<sup>27</sup> Since a parent is thus entitled to the earnings of his minor child, it follows that where he has not expressly or impliedly emancipated the child or consented to his receiving and enjoying his own earnings, he may maintain an action for the child's wages, notwithstanding payment to or a discharge by the child, against one who has employed the child, and the action is properly brought in the parent's name alone.<sup>28</sup>

**e. Emancipation of Child.** A child may be released from parental control, and become entitled to his earnings, in which event he is said to be emancipated. Emancipation may be effected: (1) By the consent of the parent, evidenced by written or oral agreement, or gathered from the circumstances; or (2) by operation of law—(a) where the parent abandons or fails to support the child, (b) where the child contracts a valid marriage, either with or without the parent's consent, or (c) where the child attains his majority, which is at twenty-one years of age, or, in some jurisdictions, in the case of females, eighteen years; and (3) a parent, who, by his conduct, leads an employer of a child to believe that the child has a right to his earnings, and to pay the child, is concluded by the payment on the equitable principle of estoppel.<sup>29</sup>

The emancipation, if without consideration, may be revoked before it is acted upon by the child, but not afterward. If supported by a valuable consideration, or, at common law, if it is under seal, so as to require no consideration,<sup>30</sup> it cannot be

25. See 29 Cyc. 1586 *et seq.*; Tiffany Pers. & Dom. Rel. 246.

26. See 14 Cyc. 805.

27. As to emancipation see *infra*, § 163, e.

28. See 29 Cyc. 1623 *et seq.*; Tiffany Pers. & Dom. Rel. 255.

29. Tiffany Pers. & Dom. Rel. 258; 29 Cyc. 1626, 1672 *et seq.*

30. As to the necessity of consideration and the effect of a seal see *supra*, § 138.



revoked.<sup>31</sup> Emancipation, as regards future services and earnings, is valid as against creditors of the parent.<sup>32</sup>

**f. Action by Parent for Injuries to Child.** Where a child is injured by the wrongful act or omission of another and the injury results in direct and proximate damage to the parent, the tort gives rise to two causes of action, one in the parent, and one in the child. The two causes of action are separate and distinct. The child cannot sue for the damage to the parent, nor can the parent sue for the damage to the child. Each must sue for his own damage, and neither action is a bar to the other. With respect to the parent's cause of action, the rule is that the father, or any other person standing in *loco parentis*, may maintain an action against the wrong-doer to recover for the resulting loss of service and incidental expenditures. In theory the action is based upon loss of service. The rules as to the necessity of showing the relationship of master and servant between parent and child to entitle the parent to sue may be stated thus:

(1) To recover for loss of service, the right to the child's services, and therefore the relationship of master and servant, actual or constructive, must be shown. The relationship exists constructively, if there is a right to service. Therefore: (a) If the child is a minor, living at home, service is presumed. (b) Temporary absence of the child from home will not prevent a recovery, if the parent has a right to its services. (c) By the weight of authority in this country, but not in England, the parent may recover if he has not relinquished his right to reclaim the child's services at any time, although the child, at the time of the injury, may be in the actual service of another, even with the parent's consent, and even though the child does not intend to return. (d) If the parent has relinquished his right to the child's services, he cannot recover on the theory of loss of service. (2) On the theory that loss of service at the time of action is the gist of an action by a parent for an injury to his child, it is held in England and in some of the United States that there can be no recovery at all where there has been no loss of service, as in the case where the child is too young to render any service; but, by the weight of authority in this country, there may be a recovery for incidental expenses in caring for the child, and there may be a recovery for prospective loss of services, however young the child may be.<sup>33</sup>

31. See 29 Cyc. 1675; Tiffany Pers. & Dom. Rel. 263, 295.

32. See 29 Cyc. 1625.

33. Tiffany Pers. & Dom. Rel. 265; 29 Cyc. 1637 *et seq.*

At common law an action would not lie for an injury resulting in the immediate death of the child; but a right of action in such a case is very generally given by statute.<sup>34</sup>

**g. Action by Parent for Seduction of Daughter.** On the seduction or debauching of his daughter, resulting actually or constructively in loss of service, the father, or on his death the mother, or any one standing *in loco parentis*, has a right of action against the wrong-doer for the loss of service and incidental expenses. In such a case damages may also be given for all that the parent may suffer from the ruin of his daughter, the disgrace to his family, and the corrupting example to his other children. The same rules apply here as in the case of other injuries, as to the necessity to show that the daughter was in the actual or constructive service of the plaintiff at the time of the injury. But the necessity for loss of service has been dispensed with by statute in some States.<sup>35</sup>

**h. Action by Parent for Abducting, Enticing, or Harboring Child.** A parent, or any one standing *in loco parentis*, has a right of action for loss of services and incidental expenses against one who abducts or wrongfully entices away or harbors his child. The same rules apply here as in the case of an action by a parent for injuries to his child, as to the necessity to show actual or constructive loss of service.<sup>36</sup>

**i. Parent's Rights in Child's Property.** Apart from his child's earnings a parent, as such, has no rights in property acquired by the child. Whatever property a child may acquire in any manner, except as compensation for services rendered by him, belongs to him absolutely, and the parent has no claim to it.<sup>37</sup>

**j. Gifts, Conveyances, and Contracts Between Parent and Child.** Gifts, conveyances, and contracts between parent and child are as valid as if between strangers. But as a general rule, a gift or conveyance from child to parent, or a contract beneficial to the parent, is presumed to have been made under parental influence, and to be voidable by the child, if made before or shortly after attaining his majority; and the parent must show that there was no undue influence.<sup>38</sup> And of course, gifts, conveyances, and contracts by a minor child are void or voidable at his option, on the ground of infancy, as in other cases.<sup>39</sup>

34. Tiffany Pers. & Dom. Rel. 277; 13 Cyc. 310 *et seq.* See *supra*, § 125.

35. See Tiffany Pers. & Dom. Rel. 278; "Seduction," — Cyc. —.

36. Tiffany Pers. & Dom. Rel. 284; 29 Cyc. 1679 *et seq.*

37. See 29 Cyc. 1654; Tiffany Pers. & Dom. Rel. 286.

38. Tiffany Pers. & Dom. Rel. 287; 29 Cyc. 1657, 1662.

39. See *infra*, § 177.

**k. Duty of Child to Support Parent.** Although there is a strong moral obligation, a child is under no legal obligation at common law to support his parents, even though they are destitute and infirm. In some jurisdictions, however, the duty is expressly imposed by statute.<sup>40</sup>

**l. Domicile of Child.** The domicile of a legitimate child is originally that of its father, and, where the parent changes his domicile, the child's changes with it. The mother's domicile acquired after the father's death determines that of the child, except where she remarries, in which case the child's domicile continues as it was on the death of the father.<sup>41</sup>

### C. SAME — GUARDIAN AND WARD

**§ 164. In General.** A "guardian" is one who is intrusted by the law with the care of the person or estate of another who by reason of incompetency is disqualified from acting for himself. A person thus disqualified, by reason either of unsound mind, lack of age, or inexperience, and whose affairs have therefore been placed under the control of a guardian, is called a "ward." Guardianship may be over either the person or the estate of the ward. A guardian of the person has substantially the same rights over his minor ward as a parent has over his child, with the exception that he has no right to the ward's services or earnings. His duties correspond to those of the parent, except that he is not bound to support the ward. A guardian of the estate is a mere manager of the ward's property. He is bound, however, to support and educate the child out of the latter's estate. A guardian may be appointed to take charge both of the person and of the estate of a ward. The various kinds of guardians are as follows:

(1) *Natural Guardians.* The father, or, if he is dead, the mother, or, if both are dead, the next of kin, is the natural guardian of a child. A natural guardian is a guardian of the ward's person only, and not of his estate.<sup>42</sup>

(2) *Guardians in Socage.* Guardianship in socage was where an infant acquired by descent land held in socage. The next of kin who could not possibly inherit became guardian, and had authority over the person of the infant as well as the land, and over personal property connected with it, but not over other personal property. On reaching the age of fourteen, the infant could select his own guardian, and terminate the guardianship. This

40. See 29 Cyc. 1619.

41. See 14 Cyc. 843-845. See also *supra*, § 61.

42. This form of guardianship takes the place of the similar but now

obsolete forms, "guardianship by nature" and "guardianship for nurture." Tiffany Pers. & Dom. Rel. 296; 21 Cyc. 14, 15.

kind of guardianship is obsolete at common law, but there is a similar guardianship by statute in most jurisdictions.<sup>43</sup>

(3) *Testamentary Guardians.* By statute, a father, and in some states a mother, on his death, may, generally by will, and in some States by deed, appoint a guardian for a minor child. Such a guardianship extends to the person, and to the real and personal property of the ward, and continues until the ward's majority. Testamentary guardianship was created in England by the statute of 12 Car. II, c. 24, the provisions of which have been substantially enacted in many of the States in this country.<sup>44</sup>

(4) *Chancery Guardians.* Courts of chancery, in the absence of statutory limitations, have jurisdiction to appoint guardians of the persons and estates of infants. In England chancery guardians were appointed by the court of chancery, and constituted the most important class of guardians. In this country courts of equity often retain a general jurisdiction over the persons and estates of infants, but, as a rule, the matter of guardianship is delegated by statute to the probate court, or other similar tribunal.<sup>45</sup>

(5) *Statute Guardians.* Guardians of the persons and estates of infants are generally appointed in this country by courts of special statutory jurisdiction, such as the probate, surrogate's, orphan's, or other similar court. Guardians appointed by these courts are now generally designated as "statute guardians," and form, in this country, by far the most important class.<sup>46</sup>

(6) *Quasi-Guardians or Guardians by Estoppel.* Such a guardian is one who, having no right to do so, assumes to act as guardian. When one who has not been regularly appointed a guardian assumes to act as such, or, by intermeddling, takes possession of an infant's estate, he may, at the election of the infant, be treated either as a wrong-doer or as a guardian.<sup>47</sup>

(7) *Guardians of Persons Non Compos Mentis and Spendthrifts.* Generally by statute, the probate or other similar court is given the power to appoint a guardian of the person and estate of persons who are *non compos mentis*, that is, of unsound mind. In some states the power is extended to include spendthrifts. Such a guardianship is governed by substantially the same rules as the guardianship of infants.<sup>48</sup>

(8) *Guardians Ad Litem.* Such a guardian is one appointed by a court of justice to prosecute or defend for an infant in a suit to which he is a party. Every court in which suit is brought

43. See 21 Cyc. 13; Tiffany Pers. & Dom. Rel. 297.

44. See 21 Cyc. 15; Tiffany Pers. & Dom. Rel. 298.

45. See 21 Cyc. 17; Tiffany Pers. & Dom. Rel. 300.

46. See 21 Cyc. 17, 23.

47. These are also called volunteer and *de facto* guardians. See 21 Cyc. 20; Tiffany Pers. & Dom. Rel. 301.

48. See 22 Cyc. 1139; and "Spendthrifts," — Cyc. —.

against an infant has power to appoint a person to defend for him, when he has no guardian, for, as an infant cannot appoint an attorney, he would otherwise be without assistance. A guardian *ad litem* may also be appointed to sue for an infant, but this is not usual, as an infant generally sues by next friend.<sup>49</sup>

§ 165. **Selection and Appointment of Guardian.** The selection of a guardian by the court is discretionary. The father, or, in this country, the mother, if the father is dead, or, if both are dead, one of the next of kin, will be appointed, unless he is unfit or the interests of the child demand the appointment of some one else. A child over fourteen years of age could select his own guardian for nurture or socage at common law, and may select his statute guardian in this country, if the person selected is suitable.<sup>50</sup>

§ 166. **Rights, Duties, and Liabilities of Guardian.** The guardian is ordinarily entitled to the custody of his ward, except as a rule, in this country, as against the parents. In all cases, however, the courts have a discretion, and will award the custody, even as against parents, as may be most for the interests of the child.<sup>51</sup> A guardian, as such, is not entitled, like a parent, to his ward's services and earnings.<sup>52</sup> He is bound to maintain his ward from the income of the estate, but he is not bound to furnish support personally.<sup>53</sup> The guardian is restricted to the use of the income of the estate in the maintenance and education of the ward, unless he has obtained leave of the court to use the principal, which leave will be granted in a case of necessity, or where the advantage to the ward clearly demands it.<sup>54</sup>

A guardian is a trustee and therefore: (1) He cannot reap any benefit from the use of his ward's property; (2) he cannot purchase at a sale of his ward's property; and (3) he cannot sell his own property to his ward.<sup>55</sup> The ward has all the rights, as against the guardian, that a *cestui que trust* has against the trustee; and therefore: (1) He may ratify the wrongful use of his property by the guardian, and claim all profits arising therefrom, or repudiate the transaction and hold the guardian to account; (2) he may repudiate the purchase of his real estate by his guardian and claim a resulting trust; and (3) he may trace and reclaim personal property converted by his guardian, when it can be identified.<sup>56</sup>

49. See 22 Cyc. 634; and *infra*, § 181.

50. See 21 Cyc. 26, 30; Tiffany Pers. & Dom. Rel. 303.

51. Tiffany Pers. & Dom. Rel. 308; 21 Cyc. 62.

52. See 21 Cyc. 71; Tiffany Pers. & Dom. Rel. 309.

53. See 21 Cyc. 65 *et seq.*; Tiffany Pers. & Dom. Rel. 310.

54. See 21 Cyc. 65 *et seq.*; 110 *et seq.*; Tiffany Pers. & Dom. Rel. 315.

55. Tiffany Pers. & Dom. Rel. 318; 21 Cyc. 77 *et seq.* 101.

56. Tiffany Pers. & Dom. Rel. 318; 21 Cyc. 78, 101 *et seq.*

If a guardian exceeds his authority, although in good faith, he is liable for any resulting loss. If there is benefit instead of loss, the ward may claim the benefit.<sup>57</sup> He is bound to exercise ordinary care and prudence, and no more, in the management of the ward's estate.<sup>58</sup> He must invest the ward's funds within a reasonable time, and if he fails to do so he will be charged interest, or, in case of gross delinquency, compound interest.<sup>59</sup> It is his duty to collect and protect his ward's property of every description. To this end: (1) He may bring suit in his ward's name, generally, or in his own name on contracts made by him as guardian; (2) he may accept property in settlement of claims; (3) he may compromise claims; and (4) he may submit to arbitration.<sup>60</sup> As a rule, he may sell his ward's personal property, but not his real property, without leave of court;<sup>61</sup> and he can execute all instruments which are necessary in the execution of the trust, but cannot bind the ward or his estate by covenants.<sup>62</sup>

Guardians must file an inventory of the estate, and account from time to time, and, at the expiration of the guardianship, must render a final account.<sup>63</sup> When a guardian has faithfully executed his trust, but not otherwise, he will be allowed compensation for his services, in the settlement of his accounts.<sup>64</sup> All guardians, with the exception of testamentary guardians in some jurisdictions, must give bonds before entering on their duties; and they and their sureties are liable thereunder for all losses occurring through the guardian's delinquencies.<sup>65</sup>

§ 167. **Termination of Guardianship.** Guardianship is terminated in the following ways: (1) By the ward's reaching his majority; (2) by the death of the ward; (3) by the death of the guardian; (4) by the marriage of a female ward; (5) under the statutes of some states, by the marriage of a female guardian; (6) by the resignation of the guardian, if he is permitted to resign; (7) by removal of the guardian by the court, when he fails to perform his duty, or when he is unfit for the position.<sup>66</sup>

#### D. MASTER AND SERVANT

§ 168. **In General.** A "master" is a person who has the right to control, within certain limits, the action of another, called a "servant," who, in turn, is bound to obey the master's commands. Servants may be classified as (1) apprentices, and (2) hired servants. An apprentice is a person, usually a minor, bound to a

57. Tiffany Pers. & Dom. Rel. 325.

58. See 21 Cyc. 78.

59. See 21 Cyc. 87-95.

60. Tiffany Pers. & Dom. Rel. 327;  
21 Cyc. 73, 74.

61. See 21 Cyc. 82, 83.

62. Tiffany Pers. & Dom. Rel. 339.

63. See 21 Cyc. 79, 150.

64. See 21 Cyc. 173-176.

65. See 21 Cyc. 45, 221 *et seq.*

66. See 21 Cyc. 50 *et seq.*; Tiffany  
Pers. & Dom. Rel. 347.

master to learn an art or trade, and to serve him during the time of his apprenticeship.<sup>67</sup> The relation of master and servant, other than apprentices, depends entirely upon agreement between the parties, express or implied. It exists where one person enters into the service of another and devotes to him his personal labor.<sup>68</sup>

This relation has from a very early period been classed with that of husband and wife, parent and child, and guardian and ward, as one of the domestic relations, and it is still so treated in modern text-books and in some of the modern statutes. It is no longer proper, however, to treat the relation as a domestic one. There was a time in England when the principal classes of servants were domestic servants, whose relation to their masters was a relation of status rather than of contract; and while slavery existed in this country, the same was true. At the present time, however, service is almost invariably the result of a contract, express or implied, between the parties to the relation.<sup>69</sup>

Apprenticeship is usually provided for by statute. Its original object was, no doubt, to enable the child to secure a thorough training in some useful trade, when the father was unable to give such training himself. Statutes usually provide that the father, the child, and the master must give their consent to the formation of the relation.<sup>70</sup>

By far the largest class of servants are hired servants, who usually agree, in consideration of wages, to place themselves under the control of their employer. This relation depends almost entirely upon the terms of the contract by which it is entered into.

**§ 169. Creation of the Relation.** As stated above, the relation of master and servant, except in the case of apprenticeship, is created by a contract of hiring between the parties; and this contract is governed by the principles of law which apply to contracts generally.<sup>71</sup> The contract may be either express or implied. There is an express contract when it is evidenced by written or spoken words. There is an implied contract when it is evidenced by conduct. Thus, if a man labors for another, at the other's request or with his knowledge and acquiescence, and under such circumstances that the other ought reasonably to know that compensation is expected, the law will imply a contract and compensation may be recovered. If services are performed for another without his knowledge, however, no contract can be implied.<sup>72</sup>

To be binding as between the parties, there must, as in the case of other contracts, be a consideration.<sup>73</sup> But a person may be a

67. See 3 Cyc. 542.

68. Tiffany Pers. & Dom. Rel. 451;  
26 Cyc. 965-968.

69. See 26 Cyc. 968; Tiffany Pers.  
& Dom. Rel. 451.

70. See 3 Cyc. 539 *et seq.*

71. See *supra*, § 126 *et seq.*

72. Tiffany Pers. & Dom. Rel. 455,  
456; 26 Cyc. 968 *et seq.*

73. See *supra*, § 130.

servant of another, although his services are merely gratuitous. If a person engages in the service of another at the latter's express or implied request, although only for a temporary purpose and with the understanding that he is to receive no compensation, he will not be entitled to wages, but the relation of master and servant will exist for other purposes.<sup>74</sup>

The contract of hiring between master and servant, like other contracts, is subject to the general rules in regard to the capacity of parties to contract,<sup>75</sup> and it is also subject to the general rules concerning mistake, fraud, etc.<sup>76</sup> And in order that the contract may be valid, the object must not be illegal.<sup>77</sup> Under the statute of frauds, as we have seen, a contract of hiring which cannot be performed within a year must be in writing, or it cannot be enforced.<sup>78</sup>

§ 170. *Termination of the Relation.* A contract of hiring between master and servant may be discharged or terminated, like any other contract (1) by agreement, (2) by performance, (3) by breach, (4) by impossibility of performance under some circumstances.<sup>79</sup>

There is a discharge or termination by agreement: (1) Where the parties agree to waive, cancel, or rescind the contract; (2) where they substitute therefor a new agreement; (3) where conditions subsequently happen operating as a discharge in accordance with the express or implied terms of the contract, as where the term of hiring expires, or where an option to terminate it is given by the contract and is exercised.<sup>80</sup> And there is a discharge by performance where the contract is fully performed by both parties.<sup>81</sup>

The contract may be discharged by breach on the part of the master or of the servant. A breach of the contract by the master generally entitles the servant to leave the employment, and to recover wages due and damages. There is such a breach, as a rule: (1) Where the master renounces the contract, either before the time for performance or in the course of performance, as by discharging the servant without cause; (2) where he renders performance or further performance impossible; or (3) where there is a breach by him of particular terms of the contract, express or implied, as by failure to pay wages due, or by ill-treatment of the servant, etc., giving the servant a right to terminate the contract, which he exercises.<sup>82</sup>

A breach of the contract by the servant generally entitles the master to discharge him, and if the contract is an entire one, it

74. Tiffany Pers. & Dom. Rel. 455.

75. See *supra*, § 131.

76. See *supra*, § 132.

77. See *supra*, § 133.

78. See *supra*, § 129.

79. See *supra*, § 136.

80. See 21 Cyc. 972, 980, 981; Tiffany Pers. & Dom. Rel. 461.

81. See 21 Cyc. 980.

82. Tiffany Pers. & Dom. Rel. 460, 465; 26 Cyc. 986 *et seq.*, 998 *et seq.*



will, in most jurisdictions, prevent him from recovering any wages. Such a breach may be by: (1) The servant's renunciation of the contract; (2) by his rendering performance or further performance by him impossible; or (3) by his breach of the particular terms of the contract, express or implied, as (a) by incompetency, (b) by criminal or grossly immoral conduct, (c) by wilful disobedience; or (4) by habitual neglect.<sup>83</sup>

There is a discharge of the contract by impossibility of performance where either of the parties dies, or the servant is permanently incapacitated by illness or personal injury, or where the prevalence of a contagious and fatal disease in the vicinity of the place where the servant is to work renders it unsafe for him to remain there, and in certain other cases.<sup>84</sup>

§ 171. Remedies for Breach of Contract. A breach of the contract of hiring by the servant gives the master a right of action for any damages he may have sustained.<sup>85</sup> Upon a breach of contract by the master by wrongfully charging the servant, the latter has the following remedies: (1) He may bring an action on the contract of hiring, and recover whatever damages he has sustained; the measure of his damages being the amount already earned and unpaid, and whatever he would have earned during the remainder of the term, less any sums actually earned in other employment, or which he might have earned by the exercise of reasonable diligence in seeking similar employment.<sup>86</sup> (2) Or he may treat the contract as rescinded, and recover on implied contract the reasonable value of the services actually rendered.<sup>87</sup> (3) A few courts allow him to treat the contract as still in force and recover wages as they fall due, upon the theory of constructive service; but in most States this doctrine is repudiated.<sup>88</sup>

§ 172. Rights, Duties, and Liabilities Inter Se. The master cannot chastise his servant.<sup>89</sup> He is not bound to give the servant a testimonial of character.<sup>90</sup> In the absence of a special agreement to the contrary, he is not entitled to the entire time and services of the servant, except during the hours of the employment.<sup>91</sup> The servant is bound to perform the business of the master with due diligence and fidelity, and with the degree of skill usually possessed by persons of ordinary capacity in the same business or employment, and if he fails in this duty, to the injury of the master, he is liable in damages.<sup>92</sup> He is bound to exercise reasonable care

83. See 26 Cyc. 987 *et seq.*; Tiffany Pers. & Dom. Rel. 460, 467.

84. See 9 Cyc. 627 *et seq.*; 26 Cyc. 985; Tiffany Pers. & Dom. Rel. 472.

85. See 26 Cyc. 1022.

86. Tiffany Pers. & Dom. Rel. 474; 26 Cyc. 998 *et seq.*; 1009 *et seq.*

87. See 26 Cyc. 1000.

88. See 26 Cyc. 999; Tiffany Pers. & Dom. Rel. 476.

89. See 26 Cyc. 1022.

90. See 26 Cyc. 996.

91. See 26 Cyc. 1020.

92. Tiffany Pers. & Dom. Rel. 480; 26 Cyc. 990, 1019.

not to injure his master's property, or the property of others in his master's care.<sup>93</sup> The master may justify a battery in defense of the servant, and *vice versa*.<sup>94</sup>

It is the duty of the master to pay the servant the wages agreed upon, unless the servant has forfeited his right to them. According to the better opinion, if a servant abandons the service without excuse, or is discharged for good cause, he forfeits the right to wages, even for the time he has served. Some courts, however, even in these cases, allow the servant to recover the reasonable value of the services actually rendered.<sup>95</sup>

§ 173. **Master's Liability for Injuries to Servant.** This is a subject of much difficulty, and one upon which the rules of law vary in the different States. It will be taken up specially at a later stage of the course. For the present it is sufficient to say that, aside from statute, it is the duty of the master, which he cannot delegate to others, and for a breach of which he is liable to the servant in the case of personal injuries, to use ordinary care: (1) To provide reasonably safe and suitable tools and appliances; (2) to provide reasonably safe premises; (3) to provide competent fellow servants and a sufficient number of them; (4) to promulgate rules, where the nature of the work requires them; and (5) to instruct and warn young and inexperienced servants as to any dangers of the employment.<sup>96</sup> The master is liable only for failure to exercise reasonable care in the performance of these duties. In other words, he is not an insurer against injury to the servant.<sup>97</sup>

On entering the service a servant impliedly contracts that he possesses the ordinary skill and experience of those engaged in the occupation he undertakes, that he will exercise ordinary care to protect himself while engaged in that occupation, and that he will assume the usual risks of the employment, including, in most States, the risks arising from the negligence of fellow servants.<sup>98</sup> To this rule, however, there are a number of exceptions. The rule does not generally apply in the following cases: (1) Where, although he may know of the defect or danger, he does not necessarily, and should not reasonably, know of or appreciate the consequent risk; (2) where, without proper notice of increased risk, he is put to a service outside of, and more dangerous than, the employment for which he was engaged; (3) where the master has promised to remove the peril, unless the danger is so immediate and imminent that an ordinarily prudent man would not continue in the service; (4) and even in the latter case, the risk will not be assumed if the

93. Tiffany Pers. & Dom. Rel. 480.

94. See 3 Cyc. 1076.

95. See 26 Cyc. 1042, 1045; Tiffany Pers. & Dom. Rel. 481.

96. Tiffany Pers. & Dom. Rel. 483; 26 Cyc. 1076 *et seq.*

97. See 26 Cyc. 1077, 1102.

98. Tiffany Pers. & Dom. Rel. 1177; 26 Cyc. 1177 *et seq.*

duty to continue in the dangerous service is required or justified by some emergency approved by law; (5) where the servant does not voluntarily expose himself to the peril.<sup>90</sup>

Where the negligence or want of ordinary care and caution on the part of the servant so far contributed to his injury that it would not have occurred but for such negligence, he cannot, as a general rule, recover therefor.<sup>1</sup>

**§ 174. Rights of Master and of Servant as Against Third Persons.** The master may, as a rule, recover from third persons for any damage suffered by reason of their wrongful interference with his relationship to the servant, either by enticing the servant away, abducting or harboring him, inflicting personal injuries upon him, falsely imprisoning him, or otherwise depriving the master of his service in whole or in part.<sup>2</sup>

On the other hand, a servant may maintain an action against a third person for causing his discharge, if he acted gratuitously and maliciously, and damage has resulted, but not otherwise.<sup>3</sup>

**§ 175. Master's and Servant's Liability to Third Persons.** On principles of the law of agency the master is liable to third persons on contracts entered into by the servant in his name, or on his behalf, if he expressly or impliedly authorized the contract, or if he subsequently ratified it, but not otherwise.<sup>4</sup> The master is also liable for frauds, negligence, and other wrongs committed by the servant, if expressly or impliedly directed or authorized by him, or if committed by the servant in the course of the employment, but not otherwise.<sup>5</sup> To render him liable under this rule, the relation must be that of master and servant, and not that of employer and independent contractor.<sup>6</sup>

A servant is not personally liable to third persons on contracts made by him in the name or on behalf of the master, unless he failed to disclose the existence of his principal, or contracted without authority.<sup>7</sup> But a servant is ordinarily personally liable to third persons for torts committed by him, although it is by his master's direction. By the weight of authority, however, he is not liable to third persons for mere non-feasance. In such a case he is liable to the master, and the master alone is liable to third

90. Tiffany Pers. & Dom. Rel. 489; 2 Jaggard Torts 1021; 26 Cyc. 1177 *et seq.*

1. See 26 Cyc. 1226 *et seq.*

2. See 26 Cyc. 1580 *et seq.*; Tiffany Pers. & Dom. Rel. 499.

3. Tiffany Pers. & Dom. Rel. 501; 26 Cyc. 1583.

4. See *supra*, § 147.

5. See 26 Cyc. 1518 *et seq.*

6. The general rule is that if one

renders service, in the course of an occupation representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished, it is an independent employment, and the relation of master and servant does not exist. See 26 Cyc. 1546 *et seq.* See also *supra*, § 144.

7. See *supra*, § 149.

persons. But for negligence, as distinguished from mere non-feasance, the servant is personally liable.<sup>8</sup>

### E. INFANTS

§ 176. **Who Are Infants.** The term "infancy" is used in law to designate the status of persons under the age of majority, which is fixed by the common law at twenty-one years for both sexes; but by statute in some States, females attain their majority at eighteen, and in a few states all minors attain their majority on marriage.<sup>9</sup>

§ 177. **Contracts of Infants — a. In General.** To protect infants from the injuries which might arise from their own acts or the acts of designing adults through their inexperience and immature mental capacity, the law has thrown its protection around them, in the form of various privileges and disabilities. The principal of these is the privilege of avoiding their contracts, and the disability to bind themselves by their contracts, under certain circumstances. Contracts of infants are either void, voidable, or valid; "void" being used in the sense of void for all purposes, and incapable of ratification; "voidable," in the sense of voidable at the option of the infant; and "valid," in the sense of binding on the infant. Emancipation of an infant by his parent relieves him, as has been seen, from the duties arising from the relation of parent and child; but this does not remove the disabilities arising from his infancy. It does not clothe him with capacity to contract.

The contracts of an infant are, as we have just said, either void, voidable, or valid. It was formerly held that all contracts of an infant which are manifestly to his prejudice are absolutely void; and in some states, still, powers of attorney, appointments of an agent, contracts of suretyship, and bonds with a penalty are held void. The tendency now is, however, to hold no contract void. Where a contract is not void, nor valid, as hereafter explained, it is simply voidable at the infant's option. Most contracts are within this class.<sup>10</sup>

The following contracts are valid and bind the infant as well as the adult: (1) Contracts created by law or quasi-contracts.<sup>11</sup> (2) Contracts for necessities. By the better opinion, these are contracts created by law.<sup>12</sup> (3) Contracts entered into under direction or authority of a statute. (4) Contracts made in order to do what he was legally bound to do and could have been compelled

8. Tiffany Pers. & Dom. Rel. 510; 26 Cyc. 1543.

9. Tiffany Pers. & Dom. Rel. 359; 22 Cyc. 511.

10. See 22 Cyc. 580 *et seq.*; Tiffany

Pers. & Dom. Rel. 360; Clark Contr. (2d ed.) 149.

11. As to such obligations see *supra*, § 138.

12. See *infra*, § 177, b.

to do. (5) In some jurisdictions an executed contract is binding upon an infant where he has received a substantial benefit under it, and cannot place the other party *in statu quo*. As to this, however, there is much doubt and the weight of authority is the other way.<sup>13</sup>

**b. Liability for Necessaries.** An infant is liable for the reasonable value of necessities furnished to him, or to his wife,<sup>14</sup> or in some but not all jurisdictions to his children,<sup>15</sup> where he refuses or neglects to provide for them.<sup>16</sup> What are "necessaries" will depend upon the circumstances of the particular case. The term includes whatever is reasonably needed for subsistence, health, comfort, or education, taking into consideration his state, station, and degree in life; but it does not include: (1) What is purely ornamental; (2) what contributes solely to pleasure; (3) what he is already fully supplied with; (4) articles which might otherwise be necessities, when he is lawfully under the care of his parent or guardian, and is supplied by him with such things as he considers necessary; (5) what concerns his estate or business, and not his person; and (6) he is not liable at law, although it is otherwise in equity, for money borrowed by him, although it is expended for necessities, but he is liable even at law where the lender applies the money himself or sees it applied in payment for necessities, or pays it for necessities already furnished.<sup>17</sup>

Persons supplying an infant act at their peril, and cannot recover if the actual circumstances were such that the things furnished were not necessities;<sup>18</sup> and to hold the infant liable, the credit must have been given to him.<sup>19</sup>

**c. Ratification and Avoidance.** The privilege of infancy is personal to the infant, and he alone can take advantage of it during his life and sanity. On his death, or if he becomes insane, his right of avoidance passes to his heirs, personal representatives, or conservator or guardian. The other party to the contract, not being himself under any disability, is bound if the infant chooses to hold him.<sup>20</sup>

A promise to perform an isolated act, or a contract that is wholly executory, is of no validity until it has been ratified; but an executed contract, or a contract that involves continuous rights and obligations, as in the case of a contract of partnership, is valid

13. See 22 Cyc. 584, 613; Clark Contr. (2d ed.) 149; Tiffany Pers. & Dom. Rel. 360.

14. Necessaries furnished wife see *supra*, § 155, d.

15. Necessaries furnished children see *supra*, § 162, a.

16. See 22 Cyc. 590; Tiffany Pers.

& Dom. Rel. 367; Clark Contr. (2d ed.) 155.

17. See 22 Cyc. 592, 597; Tiffany Pers. & Dom. Rel. 367; Clark Contr. (2d ed.) 155.

18. See 22 Cyc. 595.

19. See 22 Cyc. 591.

20. See 22 Cyc. 609.

until it has been disaffirmed.<sup>21</sup> A contract is disaffirmed by any conduct which is inconsistent with the existence of the contract and shows an intention to repudiate it.<sup>22</sup> In some jurisdictions, by statute, ratification of a contract by an infant must be in writing. In the absence of such a provision, ratification may be by an express new promise, either written or oral, or by the weight of authority, it may be implied from declarations or conduct showing an intention to adopt the contract as binding.<sup>23</sup>

The ratification or disaffirmance must be *in toto*. The contract cannot be ratified or disaffirmed in part only.<sup>24</sup> An infant may disaffirm his executory contract without first returning the consideration received by him; but after its disaffirmance he must return the consideration, if he has it. As a rule, if the contract has been executed by him, he cannot avoid it and recover what he has paid or for what he has done, without returning the consideration, if he has it; but it is otherwise, by the weight of authority, if he has squandered or otherwise disposed of the consideration during his minority.<sup>25</sup>

§ 178. **Capacity to Hold Office.** An infant can hold an office which is purely ministerial, but not one requiring the exercise of discretion or involving financial responsibility.<sup>26</sup>

§ 179. **Crimes and Torts of Infants.** We have already seen that at common law an infant under seven years of age cannot commit a crime; that between seven and fourteen there is a presumption of incapacity, which may be rebutted; and that after fourteen there is a presumption of capacity.<sup>27</sup>

These rules do not apply to torts. An infant must answer for his torts as fully as an adult, and the fact that the tort is committed under authority or command of his parents is no defense.<sup>28</sup> But tenderness of age, in proportion as it affects capacity to act intelligently, may be material to their liability, when intention to do wrong, or want of care, is an essential ingredient of the wrong.<sup>29</sup> And since an infant is not bound by his contract, except in certain cases, a breach of contract, except in those cases, cannot be treated as a tort so as to make him liable. The tort must be separate and independent of it.<sup>30</sup>

21. See 22 Cyc. 602, 612; Clark Contr. (2d ed.) 160.

22. See 22 Cyc. 612.

23. See 22 Cyc. 603, 604.

24. See 22 Cyc. 601, 604.

25. See 22 Cyc. 613-616.

26. See 22 Cyc. 515; Tiffany Pers. & Dom. Rel. 398.

27. See *supra*, § 90, b.

28. See 22 Cyc. 618; Tiffany Pers. & Dom. Rel. 406; 1 Jaggard Torts 158.

29. See 22 Cyc. 622; 1 Jaggard Torts 158.

30. See 22 Cyc. 620-622; 1 Jaggard Torts 161; Tiffany Pers. & Dom. Rel. 408.

The test of whether an action lies against an infant under such circumstances is whether the infant has done anything in excess of mere violation of a contract, and in breach of duty which the law has created or superinduced upon the contract. 1 Jaggard Torts 161, 162.

§ 180. **Torts Against Infants.** An infant has the same right as an adult to sue for injuries caused by the torts or wrongs of another.<sup>31</sup> Such actions are governed by the ordinary rules of law, and, if the infant fails to exercise due care, his contributory negligence may bar his right of recovery. The due care required by law being due care under the circumstances of the case, a less degree of care will ordinarily be required of an infant than of an adult, and therefore an infant too young to be capable of exercising due care is held, as a matter of law, incapable of contributory negligence; and in general, only such care will be required of an infant as is due care in one of his years and experience.<sup>32</sup> In some jurisdictions the negligence of the parent or guardian will be imputed to the child.<sup>33</sup>

A greater degree of care is required of an adult in dealing with an infant than with an adult.<sup>34</sup> An adult who places a dangerous agency, which from its nature is attractive to children, where it is accessible to them, may be liable for injuries caused thereby, although the children are trespassers.<sup>35</sup>

§ 181. **Infants as Parties to Actions.** An infant cannot sue in person or by attorney, but only by guardian or next friend; and, when sued, he cannot appear in person, by attorney, or next friend, but only by a general guardian or by guardian *ad litem*. In most states this matter is now regulated by statute. Where an infant is sued, and appears by guardian *ad litem*, he is bound by a judgment at law or a decree in equity as fully as an adult.<sup>36</sup>

## F. INSANE PERSONS

§ 182. **Insanity Defined.** Insanity is "a manifestation of disease of the brain, characterized by a general or partial derangement or one or more faculties of the mind, and in which, while consciousness is not abolished, mental freedom is perverted, weakened, or destroyed."<sup>37</sup> The term is used broadly in the law to denote all kinds of mental alienation, and as synonymous with the phrase *non compos mentis*.<sup>38</sup> Coke enumerates four classes of persons who are deemed in law to be insane or *non compos mentis*, namely: (1) An idiot or fool natural — that is, a person who has been of unsound mind since his birth; (2) he who was of good sound mind and memory, but, by the act of God, has lost it; (3) a lunatic, *lunaticus, qui gaudet lucidis intervallis*, who sometimes is of good sound mind and memory, and sometimes *non compos mentis*; and (4) one who is *non compos mentis* by his own

31. See 22 Cyc. 629; Tiffany Pers. & Dom. Rel. 403.

32. See 29 Cyc. 535; Tiffany Pers. & Dom. Rel. 403.

33. See 29 Cyc. 552.

34. See 26 Cyc. 1173; 29 Cyc. 429.

35. See 29 Cyc. 447.

36. See 22 Cyc. 627, 634.

37. Black L. Dict. tit. "Insanity."

38. See 22 Cyc. 1109.

act, as a drunkard. The last class will be considered separately, for drunkenness is not generally understood as a phase of insanity in law, and in many respects the rules relating to insanity do not apply in the case of drunkenness. The status of an insane person is peculiar. As he is lacking in mind, he can, as a rule, do no act which requires an intelligent mental operation.<sup>39</sup>

§ 183. Guardianship. The guardianship of persons *non compos mentis* is provided for by statute in most jurisdictions. Generally, the probate or other similar court is given the power to appoint a guardian or committee of the persons and estates of insane persons, and in some states the power is extended to include drunkards or spendthrifts.<sup>40</sup> Such guardianship is governed by substantially the same rules of law as the guardianship of infants.<sup>41</sup>

§ 184. Contracts of Insane Persons. As a general rule, a contract entered into by a person when he is so insane as to be incapable of understanding its nature and effect is voidable at his option;<sup>42</sup> but the rule is subject to the following exceptions: (1) Contracts created by law, or quasi-contracts, are binding. (2) He is liable for necessities furnished to himself, or, by the weight of authority, to his wife and children. (3) In most jurisdictions, but not in all, he cannot avoid his contract where the other party thereto acted fairly and in good faith, without actual and constructive knowledge of his insanity, and the contract has been so far executed that the other party cannot be placed *in statu quo*.<sup>43</sup> In most jurisdictions, but not in all, contracts by a person who has been judicially declared insane and placed under guardianship are absolutely void; and in a few states deeds and powers of attorneys, or other appointments of an agent, are held to be absolutely void.<sup>44</sup>

A voidable contract of an insane person may be ratified or disaffirmed by himself when sane, or by his guardian during insanity, or by his personal representatives or heirs after his death.<sup>45</sup> By the weight of authority, the right to disaffirm is personal to the insane party or his representatives, and does not extend to the other party or to strangers.<sup>46</sup> In a few jurisdictions the consideration received by the insane person need not be returned as a condition precedent to avoidance, if he is unable to return it, but the weight of authority is the other way; and in all jurisdictions it must be returned, if it can be.<sup>47</sup>

39. See, generally, 22 Cyc. 1169 *et seq.*

40. See 22 Cyc. 1120 *et seq.*; and *supra*, 164.

41. See *supra*, § 164 *et seq.*

42. See 22 Cyc. 1169 *et seq.*, 1194 *et seq.*

43. See 22 Cyc. 1200-1206; Tiffany

Pers. & Dom. Rel. 418; Clark Contr. (2d ed.) 178.

44. See 22 Cyc. 1171, 1198.

45. See 22 Cyc. 1209.

46. See 22 Cyc. 1210.

47. See 22 Cyc. 1210; Tiffany Pers. & Dom. Rel. 424; Clark Contr. (2d ed.) 184.



§ 185. **Crimes and Torts of Insane Persons.** We have already seen that, as a general rule, an insane person is not criminally responsible for his acts.<sup>48</sup> This rule, however, does not apply to his torts. Generally, an insane person is liable for his torts, to the extent of compensation for the actual damage sustained by the injured party; but when the wrong involves personal capacity, and such capacity is impossible because of mental derangement, there can be no recovery; nor is he liable for punitive or exemplary damages. Thus an insane person is liable for the actual damage if he commits assault and battery or trespass upon another's land; but, according to the better view, he cannot be held liable for a tort of which malice is an essential element, such as libel or slander, or malicious prosecution, if he was so insane as to be incapable of entertaining malice.<sup>49</sup>

### G. DRUNKEN PERSONS

§ 186. **Contracts of Drunken Persons.** A contract or conveyance made by a person, when he is so drunk that he is incapable of understanding its nature and effect, but not otherwise, is voidable at his option; but, like an infant or insane person, he is liable on contracts created by law, and for necessities. The rules as to ratification and avoidance of contracts are substantially the same as in the case of infants and insane persons.<sup>50</sup>

§ 187. **Crimes and Torts of Drunken Persons.** As we have seen in another chapter a drunken person is, with certain exceptions, criminally responsible for his acts to the same extent as if sober.<sup>51</sup> A drunken person is also liable to individuals for his torts or wrongs to the same extent as if he were sober, except that the fact of drunkenness may mitigate the damages in some cases by excluding the question of malice;<sup>52</sup> and when it amounts to insanity, it may perhaps operate as a full defense, as far as insanity is a defense to an action in tort.<sup>53</sup>

### H. ALIENS

§ 188. **In General.** An alien is a person born out of the jurisdiction of the United States, subject to some foreign government, and who has not been naturalized under their constitution and laws. Children of citizens of the United States born abroad are citizens, and not aliens.<sup>54</sup> An alien domiciled in the United

48. See *supra*, § 90, c.

49. 1 Jaggard Torts 154, 155. See 22 Cyc. 1211, 1212.

50. See 14 Cyc. 1103; Tiffany Pers. & Dom. Rel. 435; Clark Contr. (2d ed.) 186.

51. See *supra*, § 90, d.

52. 1 Jaggard Torts 165; Tiffany Pers. & Dom. Rel. 437.

53. 1 Jaggard Torts 165.

54. See Tiffany Pers. & Dom. Rel. 440; 2 Cyc. 81; and *supra*, § 26.

States is subject to the laws of the United States and of the State in which he resides to the same extent as a citizen.<sup>55</sup>

An alien has the same rights as a citizen with respect to acquiring, holding, and disposing of personal property, and may contract in relation thereto and sue and be sued on his contracts.<sup>56</sup> An alien may also sue and be sued for torts.<sup>57</sup> At common law an alien cannot take and transmit land by descent.<sup>58</sup> He can, however, take by devise or purchase, subject to the right of the State to enforce a forfeiture by inquest and office found. His title is good as against all persons but the State, and is good as against the State until office found.<sup>59</sup> So also an alien can dispose of land acquired by purchase or devise, and his grantee or devisee will take a good title against every person but the State.<sup>60</sup> The common law in this respect has been abolished in some States, and modified in others, by statute.<sup>61</sup>

An alien enemy cannot, without leave of the government, make any fresh contract or enforce any existing contract during the continuance of war between his government and the United States. Some courts require adherence to the enemy by a resident alien to disqualify him. He may be sued on existing contracts, and in such a case he may defend. Preëxisting contracts are not dissolved by the war, but the remedy is merely suspended, unless they are of a continuing nature, and antagonistic to the rules governing a state of war.<sup>62</sup> In England it has been held that an alien enemy cannot sue in tort, but it is possible that this rule does not obtain in the United States.<sup>63</sup>

55. See *supra*, § 11; and 2 Cyc. 61; Tiffany Pers. & Dom. Rel. 440.

56. See 2 Cyc. 89.

57. See 2 Cyc. 104; Tiffany Pers. & Dom. Rel. 443.

58. See 2 Cyc. 94.

59. See 2 Cyc. 90.

60. See 2 Cyc. 90.

61. See 2 Cyc. 97.

62. See Tiffany Pers. & Dom. Rel. 446; "War," — Cyc. —.

63. 1 Jaggard Torts 166. See "War," — Cyc. —.

## CHAPTER XIV

### PROPERTY AND PROPERTY RIGHTS

#### A. Corporeal and Incorporeal Hereditaments.

##### § 189. Corporeal Hereditaments.

##### 190. Incorporeal Hereditaments at Common Law.

###### a. In General.

###### b. Advowsons and Tithes.

###### c. Commons.

###### d. Ways.

###### e. Offices, Dignities, and Franchises.

###### f. Corodies and Annuities.

###### g. Rents.

##### 191. Incorporeal Hereditaments in the United States — Profits à Prendre, Rents, and Easements.

#### A. CORPOREAL AND INCORPOREAL HEREDITAMENTS

§ 189. **Corporeal Hereditaments.** Hereditaments, under which term are included all forms of real property, are either corporeal or incorporeal. Corporeal hereditaments include all real property of a visible and tangible nature. To this species of property the common law applies the term "land"; but land, in this sense, includes, not only the soil itself, but also all houses or other buildings erected thereon, as well as all other objects permanently annexed thereto. It extends down to the center of the earth and upward to the highest heavens.<sup>1</sup>

We have seen that the term "hereditaments" was used in feudal England to indicate such property as might be inherited; that is, such as was capable of passing to the heir, upon his ancestor's death, by operation of law.<sup>2</sup> It will be shown later that the law draws a distinction between the descent of personal property and that of realty. The latter passes to the heir immediately upon the death of the ancestor, while the former goes temporarily to the personal representative, that is, the executor or administrator of the estate, and is distributed by him according to the directions in the will of the deceased, or, if there is no such will, as the statute of distributions provides. Inheritance is the result of the law casting upon the heir, by its own power, and without the intervention of any act of the parties concerned, an estate after the ancestor's death. This attribute of inheritability belongs only to real property, and it is often the criterion in determining whether certain kinds of property are to be classed as real or personal.<sup>3</sup> Hereditaments comprise, in the main, therefore, im-

1. Smith Elem. L. 158; 2 Blackstone Comm. 17, 18; "Property," — Cyc. —; and *supra*, § 69.

2. See *supra*, § 70.

3. Smith Elem. L. 158; and *infra*, § 233.

movables. But under the common law there were certain articles of property which, while movable, and therefore personal, in their nature, were yet inheritable, and classed as realty. These were called "heirlooms." In many of the old English families it was the custom to allow the heir to take, not only the real property, but many chattels as well. After a certain chattel had descended thus from ancestor to heir several times, it was regarded as inheritable by special custom, and was called an "heirloom." Heirlooms, in this sense, are not recognized by the American law.<sup>4</sup>

By the old writers, the term "land" was used to denote all corporeal hereditaments. Besides including houses and permanent fixtures, the space above and the soil beneath the surface, it embraced the water which the soil supported; "and therefore," says Blackstone, "I cannot bring an action to recover possession of a pool or other piece of water by the name of water only, either calculating its capacity, as for so many cubical yards, or by superficial measure, as for twenty acres of water, or by general description, as for a pond, a watercourse, or a rivulet; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of land covered with water. For water is a movable, wandering thing, but the land which that water covers is permanent."<sup>5</sup>

§ 190. **Incorporeal Hereditaments at Common Law — a. In General.** "An incorporeal hereditament," says Blackstone, "is a right issuing out of a thing corporeal, or concerning, or annexed to, or exercisable within the same. It is not the thing corporeal itself, which may consist in lands, houses, or the like, but something collateral thereto, as a rent issuing out of those lands or houses. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled; incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong or not belong to it, without any visible alteration therein."<sup>6</sup> Incorporeal hereditaments included at the common law all rights of an intangible character which were permanent in their nature, and consisted principally of ten species: Advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, annuities, and rents.<sup>7</sup>

**b. Advowsons and Tithes.** An advowson was the right which the patron of a church or ecclesiastical benefice had to select and present or appoint the incumbent of that benefice. A tithe was the right which such incumbent had to receive the tenth part of the increase yearly arising either from lands, from the stock upon

4. Smith Elem. L. 159.

5. 2 Blackstone Comm. 18; Smith Elem. L. 159; "Property," — Cyc.

7. Smith Elem. L. 160; "Property," — Cyc. —; 2 Blackstone Comm. 20 *et seq.*; 1 Tiffany Real Prop. § 5.

6. 2 Blackstone Comm. 20.

lands, or from the personal industry of the inhabitants of the parish. Advowsons and tithes were incident to the English ecclesiastical system; but owing to the complete separation of church and state in this country, they are not recognized in our law.<sup>8</sup>

c. **Commons.** A common is the right on the part of one man to take a profit from the land of another. The right of common in England grew out of the peculiar organization of the English manor. That was a tract of land held by a lord, and occupied by him and his retainers. In the manor, there was usually a manor house, where the lord of the manor resided, and, not far away, a village. The land which was reserved by the lord for his own use and cultivation, and on which the manor house was situated, was called the "demesne land," and the rest of the arable portion of the manor, outside of the village, was either tenemental land or waste. The tenemental land was distributed among the free tenants. The waste was uncultivated, and was subject to the right of common, possessed by every inhabitant of the manor. This right was of four principal kinds, viz.: (1) Common of pasturage, or the right to pasture domestic animals thereon; (2) common of piscary, or the right to fish in the lakes or streams running through or bordering on the waste land; (3) common of turbary, or the right to take turf from the waste; and (4) common of estovers, or the right to take wood therefrom.<sup>9</sup> At a later period the right of common was extended so as to include any right on the part of one person to take pasturage, wood, turf, or fish, or any profit whatever, from the land of another. By profit in this sense is meant some corporeal thing actually removed from the other's land, and is to be distinguished from the mere right to pass over the land. It is immaterial whether the right arise by express grant of the owner or by operation of law. The right is recognized in this country, where, however, it is called "*profit à prendre*," or the right "to take a profit."<sup>10</sup>

d. **Ways.** A way, or a right of way, is the right of one man to pass over the land of another. A way does not, like a common, involve the right to take any corporeal thing from the land of another, but merely to cross it; and it does not usually give its possessor the right to cross now at one place, now at another, but merely the right to pass over the land at a particular place, selected with due regard to the convenience of both parties interested. Ways are either public or private. A public way, or highway, is one held by the public, any member of which may use it, as a country road or a street. A private way is one possessed by a private

8. 2 Blackstone Comm. 21-32; 10. Smith Elem. L. 162; and Smith Elem. L. 160, 161. *infra*, § 191.

9. Smith Elem. L. 161, 162; 2 Blackstone Comm. 32 *et seq.*

individual. Ways may originate either: (1) By act of the parties, as in the case of an express grant or dedication; (2) by operation of law, as in case of a way by prescription; and (3) by necessity. A way by prescription is one which, having been used for a long period, is presumed by law to have been originally established by grant, although no such grant can be proven. A way of necessity exists where one man has sold to another a piece of land in the middle of his field. In such a case, the grantee has, of necessity, a right of way to and from his property.<sup>11</sup> Rights of way exist in the United States substantially as in England, being one of a number of incorporeal rights which are called "easements," and which will be referred to later.<sup>12</sup>

**e. Offices, Dignities, and Franchises.** An office is the right to exercise an employment, either public or private, and to receive whatever profits are derivable therefrom. Offices, in England, were often in the nature of incorporeal hereditaments. They were either public or private. Blackstone mentions, as an example of a public office, a magistracy, and he refers to bailiffs and receivers as private officers.<sup>13</sup> In this country, however, there is no such thing as a private office, an employment of such a nature being a mere agency, created by contract, and in no sense hereditary. Public offices are of great importance here, but are never held longer than for life or during good behavior, and cannot be transmitted to the heir. They are, therefore, not hereditaments.<sup>14</sup>

A dignity is the right to enjoy a title of nobility. The leading dignities in England are those indicated by the titles of duke, marquis, earl, viscount, and baron. Titles of honor are not bestowed by the government in this country. The policy of the United States is so opposed to a titled aristocracy that congress has provided that no foreigner shall be admitted to citizenship until he shall have renounced any title of nobility that he may possess.<sup>15</sup>

A franchise is the portion of the sovereign power delegated to a private person. The word "franchise" means primarily a freedom, or privilege. In the law, it indicates one of those extraordinary privileges which can be conferred only by the government. In England, these franchises were of great variety, and were conferred either by king's grant or by parliament.<sup>16</sup> In this country, the creation of franchises is a legislative function. The most important franchises here are those given to corporations. The very right to exist as a corporation is in itself a franchise, and every special power which the corporation may possess

11. Smith Elem. L. 163; 2 Blackstone Comm. 35.

12. See *infra*, § 191.

13. 2 Blackstone Comm. 36.

14. Smith Elem. L. 163, 164.

15. Smith Elem. L. 164; U. S. Rev. St. (1878) § 2165.

16. 2 Blackstone Comm. 37.

also comes under that head.<sup>17</sup> Franchises are less often held by private individuals, but they may be so held. Thus the right to vote is an individual franchise. In England they were often inheritable, but in this country they are not so, and cannot, therefore, be classed as hereditaments.<sup>18</sup>

**f. Corodies and Annuities.** A corody is the right of one person to receive certain allotments of provisions for his maintenance. If, instead of receiving goods, he is entitled to certain payments in money, the right is called a "pension." An annuity is the right of one person to receive a periodical sum of money from another by virtue of a voluntary obligation which that other has assumed. The corody was usually due from an ecclesiastical person, while an annuity was from a temporal person. They are both merely personal charges, although inheritable under the English common law. In this country they are not hereditaments.<sup>19</sup>

**g. Rents.** A rent is the right of one man to have rendered or returned to him a certain periodical profit out of lands held by another. Ordinarily, when a rent is spoken of at the present time, a contract is contemplated by which one person agrees to pay a certain sum for the use of land or of personal property. Such a contract right would not, of course, be a hereditament. In the sense of the term here used, however, a rent is inheritable. There were three forms of rent at the common law: (1) Rent-service; (2) rent-charge; and (3) rent-seck. Rent-service was that form of rent where the profit consisted in whole or in part of personal services on the part of the tenant. If he failed to perform the services, the landlord might reassume possession of the land, although no power of distress or reëntury was reserved in the deed by which the property was originally conveyed. Rent-charge was that species of rent which existed where one had granted to another his whole interest in the land, reserving to himself an annual rental out of the land itself. In the absence of a special power of distress or reëntury, the grantor had no power to reassume possession upon default of payment of the rent; consequently a clause conferring such a power was almost invariably inserted in the deed. Such a rent was called a "rent-charge" because it was thus made a charge or burden on the land. If the rent was charged upon an estate in fee, it was called a "fee-farm rent." If no such power of distress was reserved in the deed, it thus became a mere barren rent, or rent-seck. There is no legal reason why these various forms of rent, as a hereditament, may not exist in this

17. See *infra*, § 239.

18. Smith Elem. L. 164; 19 Cyc. 1451; 1 Tiffany Real Prop. § 5.

19. Smith Elem. L. 165; 2 Blackstone Comm. 40; 2 Cyc. 458; 1 Tiffany Real Prop. § 5.

country. Many instances of them are in fact found in the United States.<sup>20</sup>

§ 191. **Incorporeal Hereditaments in the United States — Profits à Prendre, Rents, and Easements.** In the United States the only important incorporated hereditaments are: (1). *Profits à prendre*, (2) rents, and (3) easements. An easement is the right on the part of the owner of land to some privilege or benefit in neighboring land held by another, such privilege or benefit involving no proprietary rights in the soil. The essential features of an easement are: (1) A dominant and a servient estate; (2) a right on the part of the owner of the dominant estate to use the servient estate for some purpose, but not to take corporeal things therefrom; and (3) a corresponding obligation on the part of the owner of the servient estate to allow such use.<sup>21</sup>

We have seen that what we call a "*profit à prendre*" is identical with the right of common under the English law.<sup>22</sup> We have, indeed, what are called "public commons" in this country; but they are rather in the nature of easements than of commons, as Blackstone uses the term. The essential distinction between a *profit à prendre* and an easement is that in case of the former there is a right to take from the soil some corporeal thing, while an easement is a right to some advantage in the land of another which does not involve the taking away of anything therefrom. Thus, if A has a right to pass over the land of another with his horse and wagon, that right is an easement; but if he has a further right to stop and allow his horse to graze, or to take a load of turf or of fence rails, or anything, from the land, the right would be a *profit à prendre*.<sup>23</sup>

Having already considered rent as an incorporeal hereditament, it will be unnecessary to discuss it further here.<sup>24</sup>

An easement proper cannot exist independent of an ownership in lands. It must be possessed as an incident to an estate, and this estate, by reason of the fact that it is vested with a certain privilege or control over other land, is called the "dominant estate," while the estate subject to the easement is called the "servient estate." The right itself is called an "easement" when we consider it from the point of view of the dominant estate, while the burden corresponding to it, and which rests upon the servient estate, is called a "servitude." It sometimes happens that a right

20. Smith Elem. L. 165, 166; 20 Cyc. 1369; 24 Cyc. 1137; 2 Blackstone Comm. 41; 1 Tiffany Real Prop. § 354 *et seq.*

21. Smith Elem. L. 166; 14 Cyc. 1134 *et seq.*

22. See *supra*, § 190, c.

23. Smith Elem. L. 167; 8 Cyc. 346 *et seq.*; 14 Cyc. 1142; 1 Tiffany Real Prop. § 334 *et seq.*

24. See *supra*, § 190, g.



similar to an easement exists as a mere personal right, without any connection with a dominant estate, and such a right is often called an "easement in gross." But the right, under such circumstances, could not properly be called an easement.<sup>25</sup>

The most important easements are: (1) Ways, or rights of way; (2) rights in light and air; (3) rights in running water; (4) rights to lateral support; and (5) rights in party walls. Rights of way exist in this country substantially as in England, and have already been explained.<sup>26</sup>

It is well settled in England that an easement in light and air may be acquired by continued user for a requisite period. In this country the contrary doctrine is very generally held. One may here build on his own land so as to shut out the light from the windows of his neighbor's house, so long as he does not act maliciously. Easements in light and air are therefore, in this country, usually the results of express grant.<sup>27</sup>

It may be stated as a general rule that where a stream of water passes through the premises of one, and thence upon the land of another, the latter has the legal right to the use and benefit of the stream, and the former has no right to divert it from its course to the latter's detriment, nor to pollute it. He must not lessen its value to the lower proprietor in any way, beyond the mere reasonable use of the water for irrigation, manufacturing, or household purposes.<sup>28</sup>

In general, every owner of soil has a right to have his land supported in its natural position by the adjoining land. If the adjacent proprietor should make an excavation on his own land which causes his neighbor's land to cave in, he is liable to his neighbor for any damage occasioned thereby.<sup>29</sup>

A party wall is a wall common to two adjoining buildings, which has become, either by agreement or by long-continued user, subject to mutual easements of support on the part of the owners of the two structures. Very frequently those erecting buildings on adjoining parcels of land provide but a single wall, which is to be common to both structures. There is usually an agreement that this is to be a party wall. If so, each proprietor has a right to the support of the part of the wall owned by the other, and this right is an easement.<sup>30</sup>

25. Smith Elem. L. 167, 168; 14 Cyc. 1139 *et seq.*

26. See *supra*, § 190, d; 14 Cyc. 1134 *et seq.*

27. Smith Elem. L. 168; 1 Cyc. 786; 14 Cyc. 1157, 1158.

28. Smith Elem. L. 168; and

"Waters," — Cyc. —. See also *supra*, § 123.

29. Smith Elem. L. 169; 1 Cyc. 775 *et seq.*

30. Smith Elem. L. 169; 30 Cyc. 770 *et seq.*

## CHAPTER XV

### PROPERTY AND PROPERTY RIGHTS (CONTINUED)

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#### B. ESTATES IN REAL PROPERTY

§ 192. Estates in General — Tenants. An “estate” in real property is the interest which a tenant has therein. A “tenant” is one who possesses an estate in real property.<sup>1</sup> The relations which persons bear to property may be considered in two ways. We may, on the one hand, regard the ownership and possession of the property in its isolation, showing the various kinds of interests which may be had in it; or we may consider how those interests may be acquired and transferred one to another. We will take up the subject of real property from these two points of view, considering, first, interests or estates, and their classification; and, later, titles, which have reference to the transfer of estates.

We should distinguish the property from the estate which a man may have therein. Property is the thing itself, in which an estate may be held; the estate, on the other hand, is the interest which a person may have in the property. The force of the distinction will be seen when we consider that in the same property there may be a number of estates, which may be different in many particulars from each other. Thus different persons may have estates in the same property at the same time. A may own a half interest in a piece of land, while B owns the other half interest. Each owns an estate different from what it would be were the property owned by either alone. Yet the property itself is unchanged.<sup>2</sup>

1. Smith Elem. L. 170; 16 Cyc. 599.

2. Smith Elem. L. 170, 171; 16 Cyc. 599.

§ 193. **Classification of Estates.** Estates are classified in three ways: (1) With regard to what is termed the quantity of interest which the tenant has; (2) with regard to the time when that interest is to be enjoyed; (3) with regard to the number and relations of the tenants.<sup>3</sup> The interest may be that of absolute ownership or it may be qualified, limited or temporary; it may be a present interest or it may not be capable of enjoyment until some future time; it may be held by a single person or by two or more, and these may stand in various relations to each other. Furthermore there may be conditions annexed to its enjoyment, but as these conditions may be annexed to the various species of estates they are more properly qualifications of other estates than a distinct species in themselves.<sup>4</sup>

§ 194. **Estates in Possession and in Expectancy — In General.** As to the time when the enjoyment is to commence, estates are divided into estates in possession and estates in expectancy. An estate in possession is one where the right of personal enjoyment is vested in the tenant. An estate in expectancy is one the enjoyment of which cannot commence until some future time.<sup>5</sup>

It should be observed that in the case of all expectant estates the estate itself is created at a time antecedent to that when enjoyment can commence. If the creation, as well as the enjoyment, of the estate were postponed until some future day, there would be no estate of any kind until that day arrived; and then it would be an estate in possession. But, if the estate is created to-day and the enjoyment is to begin at some future time, the tenant possesses the estate at once, although there cannot be any beneficial enjoyment of it until the time specified. An estate in expectancy becomes an estate in possession at the time the right of enjoyment begins.<sup>6</sup>

Estates in expectancy are either: (1) Estates in remainder; (2) estates in reversion; or (3) executory interests.

§ 195. **Same — Remainders — Vested and Contingent.** An estate in remainder is one so created that it cannot be enjoyed until after the termination of another estate. The estate which thus precedes the estate in remainder is called the particular estate. Estates in remainder are governed by the three following rules: (1) There must be a particular estate precedent to the estate in remainder; (2) the estate in remainder must pass out of the control of the grantor at the time of the creation of the particular estate;

3. Smith Elem. L. 171; 2 Blackstone Comm. 103; 16 Cyc. 601 *et seq.*

4. 2 Blackstone Comm. 152; 16 Cyc. 606. And see Smith Elem. L. 171; 4 Kent Comm. 121.

5. Smith Elem. L. 172; 2 Blackstone Comm. 163; 16 Cyc. 605.

6. Smith Elem. L. 172.

(3) the remainder must vest in the grantee during the continuance of the particular estate or at the instant of its termination.<sup>7</sup>

If A grants an estate to B for life, remainder to C and his heirs, B has as long as he lives an estate in possession, while C's interest during that time is an estate in expectancy. B's estate is, in its relation to the remainder, a particular estate, which is said to support the remainder, for the remainder could not exist without it. In order that C's interest may be a remainder, it must have been conveyed away from A at the same time when B's interest was created. But it is not necessary that the interest in a remainder pass directly to a certain remainder-man at the time of the creation of the particular estate, for the identity of the remainder-man may depend upon a contingency. It is necessary, however, that, whether contingent or not, the person entitled to the remainder interest shall be determined upon when the particular estate comes to an end.<sup>8</sup>

Estates in remainder, or remainders, are either: (1) Vested, or (2) contingent. A vested remainder is one which is granted to a definite person, and the enjoyment of which begins upon the happening of a certain event. A contingent remainder is where the remainder-man is uncertain, or the enjoyment of the estate depends upon the happening of some uncertain event. The example already mentioned, in which A grants an estate to B for life, remainder to C and his heirs, would be an illustration of a vested remainder. Here the remainder-man, C, is a definite person, and there are no conditions annexed to his enjoyment of the estate. But if A grants the estate to B for life, remainder to the sons of C, share and share alike, if C has no sons at the time the estate is created, the remainder is contingent until a son is born, when it becomes vested. Again, if A grants the estate to B for life, remainder to C, provided he marry a certain lady, although the person of the remainder-man is certain, his enjoyment of the estate depends upon an event which may or may not happen. While C refrains from marrying the particular person, his estate is purely contingent. If the particular estate is terminated before the marriage takes place, the remainder is gone forever, because the marriage is a condition precedent to his taking the estate, and there is no longer any particular estate to support the executory interest. If the marriage takes place before the termination of the particular estate, the remainder ceases to be contingent, becoming vested the moment the condition is fulfilled.<sup>9</sup>

7. Smith Elem. L. 172, 173; 16 Cyc. 605, 648 *et seq.*; 2 Blackstone Comm. 163 *et seq.*

8. Smith Elem. L. 173.

9. Smith Elem. L. 174; 16 Cyc. 648

*et seq.*; 2 Blackstone Comm. 165 *et seq.*; 1 Tiffany Real Prop. § 118 *et seq.*; Hopkins Real Prop. 278 *et seq.*

The rule in Shelley's Case.—This celebrated rule was laid down in 1

§ 196. **Same — Estates in Reversion.** An estate in reversion is that estate which is retained by the grantor after he has granted away a particular estate less than his own. Thus if A, having an estate for ten years, grants to B an estate for five years, he reserves to himself the balance of his original estate after the particular estate granted to B is terminated. This balance which remains vested in him is called an estate in reversion, because it reverts back to him when B's estate comes to an end. It is similar to an estate in remainder, both depending upon the existence of a precedent particular estate; but it differs from the remainder in that the reversion is vested by operation of law in the grantor, while a remainder interest passes to some other than the grantor, a voluntary act on the part of the latter being necessary for its creation. If, in the illustration given above, A had granted an estate for five years to B, and the remainder of his interest to C, a remainder would have been created; but if he had merely granted O the estate for five years, saying nothing about the balance, he would naturally retain it, thus becoming a reversioner.<sup>10</sup>

§ 197. **Same — Executory Interests.** An executory interest is an estate granted to another to take effect at some future time, there being no particular estate to support it. Executory freehold interests could not be created under the common law except by will, in which case they were called executory devises. They can now usually be granted, subject to the restriction that they must not commence at a day more distant from the grant than the duration

Coke 104a, and related to cases where an estate had been granted to one person, with a limitation to his heirs in the same instrument. It was stated as follows: "It is a rule of law when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited mediately or immediately to his heirs in fee or in tail, that always in such case 'the heirs' are words of limitation of the estate, and not words of purchase." To illustrate: If an estate was granted to A for life, remainder to his heirs, the question would at once arise whether the heirs of A took thereby a vested estate in remainder or whether the words "the heirs" were merely words introduced to describe the estate of A, as if the grant had read "to himself and his heirs forever." If the last construction should prevail, A might convey away the whole property, disinheriting his heirs. The

words "the heirs" would then be words merely of limitation or description of the estate. If, however, they were words of purchase, A could but hold the property during his life, and upon his death it would necessarily go to his heirs, the heirs standing in the same position as any other remainder-men. These words were held in Shelley's Case to be words of limitation of the estate. The rule in Shelley's Case has been abolished by statute in Alabama, Connecticut, Kentucky, Michigan, Missouri, New York, Tennessee, Virginia, and Wisconsin. In New Hampshire, New Jersey, and Ohio, it is abolished as to conveyances by will. In most of the other states it is in force. Smith Elem. L. 175; 13 Cyc. 658; "Wills," — Cyc. —; 1 Tiffany Real Prop. § 130 *et seq.*

10. Smith Elem. L. 175; 16 Cyc. 661 *et seq.*; 2 Blackstone Comm. 175; Tiffany Real Prop. § 113 *et seq.*; Hopkins Real Prop. 280 *et seq.*

of a life or lives in being and twenty-one years afterward.<sup>11</sup> The rule establishing this restriction is called the "rule against perpetuities."<sup>12</sup>

§ 198. **Freeholds and Estates Less than Freeholds.** With regard to the quantity of the interest estates are classified as being estates of freehold or estates less than freehold. An estate of freehold<sup>13</sup> is an estate of inheritance or for life. An estate less than freehold, often called a leasehold, is an estate held for a certain period, or for an uncertain period less than life. Many of the distinctions drawn and the phraseology used in the modern law of real property are of feudal origin.<sup>14</sup> The term "freehold" was used in early English law to indicate an estate which was of such dignity that its ownership was becoming to a freeman. An estate for a certain time was not regarded as of such dignity, because it was necessarily limited in its duration. An estate for life, on the other hand, might be held by him as long as he was able to enjoy an estate personally, and hence was regarded as a freehold. Even an estate for a thousand years was regarded less in its dignity than an estate for life. If the estate was to continue for a person's life, and then to descend to his heirs, it was, of course, a freehold. We have, therefore, these two general kinds of estates. A freehold estate is also called a real estate in real property, while an estate less than freehold is called a personal estate in real property, and is referred to, as will be seen in a subsequent chapter, as a chattel real.<sup>15</sup>

§ 198A. **Freeholds of Inheritance and Not of Inheritance.** Freeholds are subdivided into: (1) Freeholds of inheritance; and (2) freeholds not of inheritance. Freeholds not of inheritance are estates for life. Freeholds of inheritance are divided into inheritances absolute, or in fee simple, and inheritances limited, such as an estate in fee tail. An estate in fee simple is an estate

11. Smith Elem. L. 176; 2 Blackstone Comm. 173; "Wills," — Cyc. —; Tiffany Real Prop. § 318 *et seq.*; Hopkins Real Prop. 298 *et seq.*

The reason of this was that for the creation of a freehold livery of seisin was necessary. From its very nature this could not take place *in futuro*.

12. See 30 Cyc. 1466.

13. A freehold is defined by Blackstone as "such an estate in lands as is conveyed by livery of seisin or, in tenements of any incorporeal nature, by what is equivalent thereto." Livery of seisin was a formal delivery of the ownership of the property. It

was customary for the grantor and the grantee to go upon the property, and, corporeal delivery of the entire land being impossible, the former would, in the presence of witnesses, pluck a twig from the tree, or take a piece of turf from the land, and hand it to the grantee, such delivery of a part symbolizing the delivery of the whole.

14. As to the "feudal system" see *supra*, § 66.

15. Smith Elem. L. 177; 16 Cyc. 601; 2 Blackstone Comm. 103 *et seq.*; 1 Tiffany Real Prop. § 18; Hopkins Real Prop. 34.

granted to a person and his heirs in general. An estate in fee tail is an estate granted to a person and certain particular heirs.<sup>16</sup>

There were, at the time when the feudal system was in force, certain lands which did not come under its operation. These were called allodial lands. The owner of such lands had free control over them, not holding them of any superior lord. The interest which the owner of an allodium had was not called an estate, for he was not regarded as a tenant, but a proprietor. Those lands which came under the operation of the feudal system could not be thus independently owned. All that the tenant could possess was an estate in them, and the fee simple was the greatest of all the various estates which he might hold. The practical difference between an estate in fee simple and the interest of an allodial proprietor was that the former was held by tenure, to which various services were attached, while the latter was free from all feudal conditions. In the United States, while all interests in lands are commonly referred to as estates, and the distinctions between the different kinds of estates are in full force, lands are for all practical purposes allodial.<sup>17</sup>

The conveyance or grant of a fee simple estate is usually couched in the following terms: "To have and to hold to himself and his heirs forever." There is, in such a grant, no attempt to restrict or entail the estate to any particular heirs; but if the grant should read, "to himself and the heirs of his body forever," it would be an estate in fee tail, being restricted to certain particular heirs — that is, to his issue. The statute *de donis* prevented the alienation by a tenant in tail so as to defeat heirs in tail. When an estate is granted to a man and the heirs of his body generally, it is called an estate tail general; but if granted to one and certain particular heirs of his body, as, for example, those "by his present wife begotten," it is an estate tail special. If granted to him and the male heirs of his body, it is called an estate tail male; if limited to the female heirs of his body, an estate tail female. In most of the states of the United States, estates tail have either been abolished or so modified as to be entirely different from their English original. They are usually either turned into fee simples or held to create estates in the grantee for life, remainder to the specified heirs in fee simple.<sup>18</sup>

§ 199. Same — Life-Estates — a. Classification. An estate for life is one so created as to continue during the life of some specified person. Estates for life are either: (1) Legal, that is, such as are created by operation of law; or (2) conventional, that is,

16. Smith Elem. L. 178; 16 Cyc. 601 *et seq.*; 2 Blackstone Comm. 103 *et seq.*; 1 Tiffany Real Prop. § 18 *et seq.*; Hopkins Real Prop. 34 *et seq.*

17. Smith Elem. L. 178, 179.

18. Smith Elem. L. 179; 16 Cyc. 601 *et seq.*

such as are created by act of the parties. The legal life-estates are three: (a) Estates tail after possibility of issue extinct; (b) estates by the curtesy; and (c) estates in dower. Conventional life estates are either: (a) Such as are to continue during the tenant's own life; or (b) estates *pur autre vie*,<sup>19</sup> which terminates with the life of some person other than the tenant.<sup>20</sup>

**b. Estate Tail after Possibility of Issue Extinct.** Estates tail after possibility of issue extinct can exist only when, in case of an estate granted in fee tail special, as explained in a previous section, there is no further chance for heirs capable of inheriting the estate to be born. Thus, if an estate is granted to A and the heirs of his body by his present wife, the death of the wife would make the possibility of issue extinct, and the estate would thereafter be a mere life interest. It would be impossible for such an estate to arise in case of an estate in fee tail general, because, the estate being limited to the heirs of his body, the moment the possibility of issue was made extinct by his death, the estate would cease also.<sup>21</sup>

**c. Curtesy.** An estate by the curtesy is a life-estate, to which the husband becomes entitled upon the death of his wife, in all the real property of which she has been seized of an estate of inheritance at any time during coverture. The essentials of an estate by the curtesy are: (1) A lawful marriage; (2) seizin by the wife of an estate of inheritance during coverture; (3) issue born alive during the life of the wife, and capable of inheriting the estate; and (4) the death of the wife.<sup>22</sup>

It has already been seen that, by the common law, the husband was entitled, during coverture, to the rents and profits of his wife's real property. He had this right by virtue of the marriage relation itself, and it ceased when that relation terminated. But if issue capable of inheriting the property were born, he had an additional right or estate in it — the estate by the curtesy, as it is called — the enjoyment of which was, however, conditional upon his surviving her. From the time of the birth of issue until the death of the wife, this interest was called an estate by the curtesy initiate; after her death, an estate by the curtesy consummate. The right to the rents and profits of the wife's realty during coverture, which existed at the common law, has quite generally been abolished by the married woman's acts in this country. The estate by the curtesy has also been abolished in many of the states.<sup>23</sup>

**d. Dower.** An estate in dower is a life-estate, to which, at com-

19. For the life of another.

20. Smith Elem. L. 180; 16 Cyc. 614; 2 Blackstone Comm. 120 *et seq.*

21. Smith Elem. L. 180; 16 Cyc. 614; 2 Blackstone Comm. 124.

22. Smith Elem. L. 181; 12 Cyc. 1001; 2 Blackstone Comm. 126.

23. Smith Elem. L. 181. And see *supra*, 154, f.



mon law, the wife becomes entitled, upon the death of her husband, in one third of all the real property of which he was seized of an estate of inheritance at any time during coverture. The essentials of dower are: (1) A lawful marriage; (2) seizin during coverture of an estate of inheritance by the husband; and (3) the death of the husband. Dower is the counterpart of curtesy. The principal points of distinction between the two estates are that curtesy vests in the husband, dower in the wife; to curtesy, the birth of issue is essential, while it is not necessary to dower; curtesy covers all property of the wife which the issue might by any possibility inherit, while dower gives a right only to one third of the husband's property. Dower exists in its common-law form in most of the American states, but has been abolished in some.<sup>24</sup>

**e. Tenancy Pur Autre Vie.** A tenant *pur autre vie* is one who holds an estate during the life of another. The one for whose life he so holds it is called the *cestui que vie*. If the tenant *pur autre vie* survive the *cestui que vie*, the estate ceases at the latter's death. If the tenant, however, dies before the *cestui que vie*, the estate is not terminated. At the common law this presented a peculiar situation. The reversioner had no right to take the land, because the particular estate had not come to an end; the heir could not take it, for it was not an estate of inheritance; the personal representative could not, because it was not a chattel, but a freehold interest. Consequently it belonged to nobody, and whoever came first upon the land and took possession could legally hold the property until the death of the *cestui que vie*. Such a person was called a general occupant. In some of the states of this country, by statute, the estate would, in this contingency, go to the heirs of the tenant *pur autre vie*; in others, to his personal representative.<sup>25</sup>

**§ 200. Estates Less than Freehold.** Estates less than freehold are four: (1) Estates for years; (2) estates from year to year; (3) estates at will; and (4) estates at sufferance. The relation which exists between the tenant for years, at will, from year to year, or at sufferance, and the one from whom he holds, is called the relation of landlord and tenant.<sup>26</sup>

An estate for years is one created to exist for a certain specified time. In order to constitute such an estate, it is not necessary that the time for which it is to continue should be a year, or any number of years. It may be for a week, a month, a quarter, a year, or any definite period.<sup>27</sup>

24. Smith Elem. L. 182; 14 Cyc. 871; 2 Blackstone Comm. 129.

Cyc. 605; 24 Cyc. 845; 2 Blackstone Comm. 140.

25. Smith Elem. L. 182; 16 Cyc. 614.

27. Smith Elem. L. 183, 184; 24 Cyc. 958.

26. Smith Elem. L. 183, 184; 16

An estate at will is an estate created for an indefinite time, and terminable at the will of either party. If an estate is strictly at will, it may be terminated by either party at any time. It is customary, however, for statutes to require that a certain notice be given before either party can bring it to an end.<sup>28</sup>

An estate from year to year is one created to exist for an indefinite number of definite periods of time, and which may be brought to an end by either party, upon due notice to the other, at the end of any one of these periods. Estates from year to year partake of the nature both of estates for years and of estates at will. They were originally estates at will where it was customary to pay rent periodically, that is, by the week, month, year, etc. It was early provided that where rent was thus paid by the lessee, the lessor could not terminate the estate except upon sufficient notice to the lessee of his intention to do so. As to the time when notice must be given, statutes are widely divergent; but the time when the party is able to bring the estate to an end corresponds to the time when an instalment of rent is payable. The necessity of giving notice rests upon the lessee as well as upon the lessor.<sup>29</sup>

An estate at sufferance is an estate for an indefinite time, existing where a tenant wrongfully holds the possession of property after the termination of an estate by virtue of which he had rightful possession. It may be terminated at any time by the entry of the owner upon the property. The tenant at sufferance has, at common law, only a wrongful possession of the property. Examples of his estate are: Where the tenant holds over after the termination of an estate for years, at will, or from year to year; where a tenant *pur autre vie* holds over after the death of the *cestui que vie*; where an undertenant holds over after his landlord's tenancy has expired.<sup>30</sup>

§ 201. Estates in Severalty, in Joint Tenancy, and in Common. As to the number and relation of the tenants, estates are either: (1) Estates in severalty; (2) estates in joint tenancy; or (3) estates in common.

(1) An estate in severalty is an estate which is held by one tenant only.<sup>31</sup>

(2) An estate in joint tenancy is one which is held by two or more tenants jointly. In order to create a joint tenancy there must coexist what are known as the four unities: (1) Unity of time; (2) unity of title; (3) unity of interest; and (4) unity of possession. The characteristic feature of every joint tenancy is the

28. Smith Elem. L. 183, 184; 24 Cyc. 1036.

29. Smith Elem. L. 183, 184; 24 Cyc. 1027.

30. Smith Elem. L. 183, 184; 24 Cyc. 1042.

31. Smith Elem. L. 185; 16 Cyc. 606; 2 Blackstone Comm. 179.

right of survivorship. By this is meant the right which the surviving joint tenants have to the interest of a particular tenant after his death, to the exclusion of his heirs. The legal conception of a joint tenancy is a highly artificial one. Each tenant is seized of the entire estate. He is said to hold "*per my et per tout*," not only his own half, but all; and this is true, except for purposes of alienation. One joint tenant may dispose of his share to a stranger; the latter, however, becoming a tenant in common, instead of a joint tenant with the others. There must be unity of time (that is, it is necessary that the interests of the various joint tenants begin at the same time), unity of title (that is, their title must have been acquired by the same act or event), unity of interest or estate (that is, the duration of the estate must be the same as to both tenants), and unity of possession (that is, they must hold the property jointly). The right of survivorship results naturally from the nature of the estate. There being but one estate, which each tenant holds in its entirety, if one tenant dies there is no part of the estate which could properly vest in the heir, because the ownership of the whole by the others continues. The survivors do not get any additional interest by the death of the one. They merely continue to own the estate they had before. While one joint tenant is allowed to sell his interest during life, he cannot dispose of it by will, because that would defeat the right of survivorship. Nor does the wife or husband of a joint tenant have dower or curtesy in the interest after the tenant's death.<sup>32</sup>

When an estate is granted jointly to husband and wife, it assumes a character somewhat different from the ordinary joint tenancy, and is called an "estate in entirety." During coverture the husband has full control over the estate, and may convey it subject to the wife's right of survivorship. This right of survivorship cannot be destroyed by either party, and there can, therefore, be no partition of the estate.<sup>33</sup>

(3) An estate in common is an estate held by one, the possession of which is united with that of an estate held by another in the same property. The only requisite of estates in common is that there be unity of possession. The estates may be acquired at different times; they may be had from different grantors in different ways; they may be held for different periods, each being either in fee, in tail, for life, for years, at will, etc.; but, if they are possessed together in the same property, they are estates in common. The interests may be unequal. One may, for example, own a quarter interest, while his cotenant has the residue, or they may be equal, each holding an undivided half. One tenant in com-

32. Smith Elem. L. 185, 186; 23 Cyc. 482.

33. Smith Elem. L. 186; 21 Cyc. 1195. And see *supra*, § 154, 1.

mon may convey his interest to a stranger, and the latter will become a tenant in common, having exactly the same interest that his grantor held. In fact, the estates held by tenants in common are distinct interests, coming into relation with each other merely because they are held in the same property. If the land were to be divided into separate parcels proportionate to the amount of the various interests of the tenants, as may be done by partition, the tenancy in common would cease, because unity of possession no longer exists. The estates would not then be in the same property, but in different parcels.<sup>34</sup>

§ 202. **Absolute and Conditional Estates.** As to the conditions upon which they are held, estates are either absolute or conditional. An absolute estate is one which vests in the tenant unconditionally. A conditional estate is one whose existence is made to depend upon the happening or not happening of some uncertain event.<sup>35</sup> The principal conditional estates are: (1) Estates upon condition; (2) estates upon conditional limitation; and (3) estates in mortgage.

(1) An estate upon condition is one so created that it becomes vested or enlarged, or is defeated, upon the happening or not happening of some uncertain event.<sup>36</sup> This is the typical form of a conditional estate. If the condition annexed to it is one upon the performance of which the estate is to become vested or enlarged, it is called a "condition precedent"; as if an estate should be granted to one upon condition that he marry within a certain time, or if one should grant an estate for life to A, and, provided A pay a certain sum, then to himself and his heirs forever. On the other hand, if the estate is made to vest at once, subject only to defeat in case of breach of the condition, it would be a condition subsequent. As an example of a condition subsequent, the case of an ordinary conveyance of a city lot, with building restrictions, might be cited. Such a conveyance usually consists of a grant of an estate in fee simple, subject to the condition that B shall build upon the lot, within a certain time, a house of a certain value.<sup>37</sup> Conditions may be express or implied. An express condition, also called a "condition in deed," is one which is created openly in the instrument which conveys the estate. An implied condition is one which arises by operation of law, as an incident to an estate.<sup>38</sup> Upon breach of the condition in an estate upon condition subsequent, the estate does not immediately come

34. Smith Elem. L. 186; "Tenancy in Common," — Cyc. —.

35. Smith Elem. L. 187; 16 Cyc. 606; 2 Blackstone Comm. 152; 1 Tiffany Real Prop. § 64 *et seq.*

36. Smith Elem. L. 188; 16 Cyc. 606; 2 Blackstone Comm. 152.

37. Smith Elem. L. 188; 16 Cyc. 606.

38. Smith Elem. L. 188; 16 Cyc. 606.

to an end, but is merely subject to forfeiture by the grantor, who may then reënter at once upon the property. But this right to declare the estate forfeited may be expressly or impliedly waived. When the condition is precedent, it must be performed before the estate can vest or be enlarged.<sup>39</sup>

(2) An estate upon conditional limitation has been defined as one limited in its duration to the time when a particular event shall happen.<sup>40</sup> Others, however, use the term to indicate, not the estate which comes to an end by the limitation, but the estate which is thus brought into existence. For example, Tiedeman says: "A conditional limitation is an estate limited to take effect upon the happening of the contingency, and which takes the place of the estate which is determined by such contingency."<sup>41</sup> For example, if an estate is granted to a widow, to hold "so long as she remains unmarried," this is a conditional limitation. The moment the widow remarries, the estate ceases. Hence it is the leading distinction between such an estate and one upon condition that while, in case of the former, no act is necessary to terminate the estate upon breach, it reaching the limit of its existence the moment the condition is broken, the estate upon condition requires an act of reëntry on the part of the grantor to bring it to an end.<sup>42</sup>

(3) An estate in mortgage was, at the common law, a species of estate upon condition, existing where real property was conveyed to secure the payment of the mortgage debt. This theory of a mortgage is still adhered to in some of our states; but in others a mortgage is regarded as a mere lien upon the property.<sup>43</sup>

§ 203. **Equitable Estates — Uses and Trusts.** An equitable estate is one which is recognized and protected only by courts of equity. Equitable estates usually take the form of uses or trusts. A use exists where a legal estate is vested in one person, who is required to hold the property to the use of another. He who holds property to the use of another is called a "feoffee to use." He who has the beneficial interest is called the "*cestui que use*." A trust estate is substantially the same as a use. Here, however, the person having the legal estate is said to hold it "in trust for" the other. He who holds property in trust for another is called a "trustee." The one for whose benefit it is held is known as the "*cestui que trust*."<sup>44</sup>

39. Smith Elem. L. 188; 16 Cyc. 606.

40. Smith Elem. L. 189.

41. Tiedeman Real Prop. § 281. And see 16 Cyc. 607.

42. Smith Elem. L. 189; 16 Cyc. 607.

43. Smith Elem. L. 189; 27 Cyc. 957.

44. Smith Elem. L. 190; 16 Cyc. 88; "Trusts," — Cyc. —; 1 Tiffany Real Prop. 82 *et seq.*

The trustee, or feoffee to use, is said to hold the legal estate, his interest being the only one which is recognized in the courts of law; while the interest of the *cestui que use* or *cestui que trust* is a purely equitable estate. The trust is the historical successor to the use. In tracing their development, we find that five points are to be considered: (1) The conditions previous to the statutes of mortmain; (2) the statutes of mortmain, and their effect; (3) their evasion by the use; (4) the statute of uses; and (5) the invention of the trust. In England during the period immediately preceding the granting of the Great Charter (1215), the church had, through its ecclesiastical corporations, attained to great wealth and power. The accumulation of lands by the great religious houses had gone so far that at one time it is said that fully one fourth of the lands of England were in the hands of the clergy. Lands held by the religious corporations were practically unproductive to the lords of whom they were held; and hence it became the aim of the nobles, as well as of the king, to prevent a further absorption in *manus mortuus*, or into these dead or unproductive hands, of the realty of the realm. This condition led to the passage of the statutes of mortmain, the effect of which was to make grants of land to corporations, whether ecclesiastical or otherwise, absolutely void. These acts were passed at various times, from 1217 down to the reign of Henry VIII. The result of these acts was to stimulate the ecclesiastics to discover some means of evading them. They adopted the plan, until then almost unknown, of granting the estate to a feoffee to use, to hold to the use of the corporations. The common-law courts recognized the title to be in the feoffee, and hence held that this was no violation of the mortmain statutes. But the court of chancery — the chancellor himself being usually an ecclesiastic — aiming to carry out the actual intent of the parties, would compel the feoffee to hold the estate to the use of the corporation. This led to the enactment of the statute of uses, in the reign of Henry VIII (1535). This statute provided that, wherever the use was, there should the legal estate be also. It was called the "Statute for Transferring Uses into Possession." If, therefore, an estate was granted to A, for the use of a corporation, the statute operated to convey the legal estate to the corporation which had the use. The conveyance would thus become practically a grant to the corporation, and was void under the statutes of mortmain. The legal and equitable estates being then in the same person, the common-law courts took cognizance of uses. It soon became the settled principle with them that a use could not be limited upon a use; that is, in a grant to A to the use of B to the use of C, the last use was void. Hence B, having the equitable estate,

would be recognized as the legal owner of the land. But here, again, chancery interfered to protect the interests of the church. The chancellor held that he would enforce a use which was limited upon a use. The common-law courts, in the illustration just given, would not recognize the title as passing, by the statute of uses, any further than B, and consequently such a grant was not in violation of the acts of mortmain. The chancellor, however, would compel B to hold in trust for C, and the statutes were once more evaded. The trust estate, then, in its original, was merely a use limited upon a use. In its modern form, however, the intermediate use is discarded, being no longer necessary, and the trust and the use are identical. Trust estates are of very great importance in the modern law.<sup>45</sup>

<sup>45</sup>. Smith Elem. L. 190-192;  
"Trusts," — Cyc. —.

## CHAPTER XVI

### PROPERTY AND PROPERTY RIGHTS (CONTINUED)

#### C. Titles to Real Property.

- § 204. Titles in General.
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- 206. Classification of Titles by Purchase.
- 207. Title by Escheat.
- 208. Title by Accretion.
- 209. Title by Abandonment.
- 210. Title by Forfeiture.
- 211. Title by Prescription.
- 212. Title by Adverse Possession.
- 213. Title by Marriage.
- 214. Title by Alienation.
- 215. Title by Execution.
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- 218. Tax Titles.
- 219. Title by Devise and Title by Grant.
  - a. Title by Devise.
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- 220. Classification of Deeds — Common-Law Deeds.
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#### C. TITLES TO REAL PROPERTY

§ 204. **Titles in General.** A title to real property is the means by which an estate therein is held. A title is sometimes said to be the means by which an estate is acquired. But the conception of the term adopted by the best authorities seems to be that the title is rather the result of the acquirement of an estate than the means of acquiring it. Thus, we speak of one having a title by descent or inheritance. Here the means or process of acquiring is called "descent." The title is that which is so acquired. What, then, is this product of the transfer; this which we call "title"? Blackstone, following Lord Coke, says that it is "the means whereby the owner of lands hath the just possession of his property."<sup>1</sup> And he adds that a complete title involves the actual possession, the right of possession, and the right of property. Professor Walker says: "The truth is that title means the same thing as ownership."<sup>2</sup> Adopting this view, we may say that the property is the thing which is held, the estate is the interest which the tenant has in the property, while the title, to speak figuratively, is a handle which enables the tenant to firmly grasp his estate; in other words, title is the means by which he holds his interest. Titles to real property are, however, usually considered in the law only with reference to the means by which they are acquired.<sup>3</sup>

1. 2 Blackstone Comm. 195.

3. Smith Elem. L. 193, 194.

2. Walker Am. L. 378.



§ 205. **Title by Descent and Title by Purchase.** Title by descent is that title which is acquired, by operation of law, by an heir in the property of an ancestor upon the latter's death. Title by purchase includes all forms of title except that by descent. The consideration of title by descent will be postponed to a subsequent chapter on the law of succession after death.<sup>4</sup> The word "purchase" is here used in a much more enlarged sense than the non-professional reader is accustomed to attach to it. The popular meaning of the term is "to buy." But title by purchase includes, not only titles which result from the buying of property, but also titles by the will of a deceased person, and many others which result purely from the operation of law.<sup>5</sup>

§ 206. **Classification of Titles by Purchase.** Title may be acquired by purchase in two ways: (1) By operation of law; and (2) by alienation. Title by operation of law is that title which is acquired by virtue solely of the working of some legal principle, and without an act on the part of any person. Title by alienation is that which is acquired as the result of an act on the part of one or more persons. Title by operation of law is of seven different kinds: (1) By escheat; (2) by accretion; (3) by abandonment; (4) by forfeiture; (5) by prescription; (6) by adverse possession; and (7) by marriage. With reference to title by operation of law, it should be observed that it is confined to cases where the transfer is by operation of legal principles alone, and does not include transfers by the act of the agents of government. Thus, land sold for the non-payment of taxes would not be transferred by operation of law, but by alienation.<sup>6</sup>

§ 207. **Title by Escheat.** Title by escheat is that which the state acquires in property by operation of law when the owner thereof dies intestate<sup>7</sup> and without heirs. Escheat (from the French word "*eschoir*," meaning "to happen") was the term applied under the feudal system to the reverting of an estate back to the feudal lord when there was default of inheritable blood after the death of the tenant. The feudal doctrine was, it will be remembered, that all lands were held immediately or mediately of the king; and the final escheat would therefore be to the crown. By analogy to this feudal idea, the state, in this country, takes property of which there is no other owner; and, if the want of an owner results from the failure of heirs, it takes its title by escheat.<sup>8</sup>

§ 208. **Title by Accretion.** Title by accretion is that which is acquired by the owner of lands in such additional soil as is added

4. See *infra*, § 231 et seq.

5. Smith Elem. L. 194, 195.

6. Smith Elem. L. 195.

7. That is, without disposing of the property by will.

8. Smith Elem. L. 196; 16 Oyo.

548. And see *infra*, § 234.

gradually to it by natural forces. This addition of soil is ordinarily the result of alluvion. It has been seen in the discussion of the subject of fixtures that whenever property is permanently annexed to land it becomes part of that land. It is upon the same principle that soil gradually washed up by the sea or other waters, which is said to be added by alluvion, becomes the property of the owner of the soil to which it attaches itself.<sup>9</sup>

§ 209. **Title by Abandonment.** Title by abandonment is that which the owner of the legal estate in lands may acquire by operation of law when an incorporeal hereditament, equitable estate, or executory interest in those lands is given up. The effect of the abandonment of such rights or interests is to release the property from them. Mere non-user will not be sufficient to produce this effect. Some act of abandonment must take place.<sup>10</sup>

§ 210. **Title by Forfeiture.** Title by forfeiture is that which may be acquired by the grantor of an estate upon condition subsequent upon breach of such condition by the grantee. This usually requires an act of reëntry on the part of the grantor, and, unless he reënters within a proper time, the breach of the condition will be considered as waived.<sup>11</sup>

§ 211. **Title by Prescription.** Title by prescription is that which is acquired in an incorporeal hereditament by one who has used it adversely for a certain period. The characteristic of title by prescription is that after a certain time, during which the incorporeal hereditament is in use by a particular person, he is presumed to have obtained the right to it originally by grant. The period of adverse user necessary is, in most jurisdictions, twenty years.<sup>12</sup>

§ 212. **Title by Adverse Possession.** Title by adverse possession is that which is acquired in lands by one who has occupied them adversely for a certain time. This mode of acquiring title is similar to that by prescription, but differs from it in two particulars: (1) That by it a title to lands is obtained, while prescription applies to incorporeal property; and (2) that no grant is presumed.<sup>13</sup>

§ 213. **Title by Marriage.** Title by marriage is that which either husband or wife acquires in the real property of the other by virtue of their relationship. Thus, estates in dower and by the curtesy are held by this title.<sup>14</sup>

§ 214. **Title by Alienation.** Title by alienation may be either: (1) By involuntary alienation, or (2) by voluntary alienation.

9. Smith Elem. L. 196; 29 Cyc. 13. Smith Elem. L. 198; 1 Cyc. 348; "Waters," — Cyc. —. 968.

10. Smith Elem. L. 197; 1 Cyc. 3.

14. Smith Elem. L. 198. See *supra*,

11. Smith Elem. L. 197; 16 Cyc. 606, 607; and *supra*, § 202.

§§ 154, f, k; 199 c, d.

12. Smith Elem. L. 197. And see 14 Cyc. 1145.

Title by involuntary alienation is that which is acquired by the act of some one other than the former owner of the property. Title by voluntary alienation is that which is acquired by the act of the former owner of the property, either with or without the concurrent act of some other person. The principal forms of title by involuntary alienation are: (1) Title by execution; (2) title by judicial decree; (3) title by eminent domain; and (4) tax titles.<sup>15</sup>

§ 215. **Title by Execution.** Title by execution is that title to property which is acquired when such property is sold under an execution to satisfy the judgment of a court of law. The decision of a court of common law upon a case presented to it is called a "judgment." In its nature it is merely a statement of the conclusion reached as to the rights of the parties. In order to enforce the rights as thus determined, it is necessary to issue what is called a "writ of execution," by which the sheriff or other executive officer is usually directed to satisfy the judgment debt out of the property of the defeated party. The officer is ordinarily required to levy first upon the personal property of the defendant; and, if there is not sufficient of it to satisfy the judgment, his real property may be seized and sold. It is the title which is transferred by this sale that is called "title by execution."<sup>16</sup>

§ 216. **Title by Judicial Decree.** Title by judicial decree is that which is acquired to property transferred by virtue of a decree of a court of equitable jurisdiction. Courts of equity have in many cases the power to decree the sale of lands. For example, the equitable foreclosure of a mortgage sometimes results in a decree by which the title to the property becomes vested in the mortgagee; and many other instances might be cited.<sup>17</sup>

§ 217. **Title by Eminent Domain.** Title by eminent domain is that title which the government or a public or quasi-public corporation acquires in real property when such property is taken for public use, on making just compensation to the owner. This form of title is that which is acquired by the right of eminent domain, which has already been mentioned.<sup>18</sup> The power to take lands by eminent domain is vested in the government, but may be delegated by the legislature to corporations of a public or quasi-public character; such as cities, railroad companies, etc.<sup>19</sup>

§ 218. **Tax Titles.** A tax title is the title which is acquired by the purchaser of land which is sold by a public officer for the non-payment of taxes assessed thereon. When a tax has been levied on lands, and has not been paid, statutes usually provide, as a

15. Smith Elem. L. 198, 199.

18. See *supra*, § 68, page 82.

16. Smith Elem. L. 199; 17 Cyc. 878, 949, 1233.

19. Smith Elem. L. 200; 15 Cyc. 543.

17. Smith Elem. L. 199; 24 Cyc. 1.

means of enforcing the payment of the tax, that a public officer, usually the tax collector, may, after a certain time has elapsed, and after the lands have been properly listed and the sale advertised, sell at public sale so much of the lands as is necessary in order to pay the tax and the expenses of the sale. Such a sale, when all formalities have been complied with, vests an absolute title to the property so sold in the purchaser, and this title is called a "tax title."<sup>20</sup>

§ 219. **Title by Devise and Title by Grant.** Title by voluntary alienation is of two general kinds: (1) Title by devise, and (2) title by grant.

a. **Title by Devise.** Title by devise is that title to real property acquired at the death of the devisor by virtue of his last will. The nature of devises will be considered in a subsequent chapter, on the law of succession after death.<sup>21</sup>

b. **Title by Grant — Public and Private.** Title by grant is that which is acquired by virtue of a formal conveyance of the property from one person to another. It should be observed that the term "grant" is here used in a general sense, as including any form of voluntary conveyance except a will. Title by grant is the most common form of title to real property. Title by grant is of two kinds: (1) Title by public grant or by patent, and (2) title by private grant, or by deed.<sup>22</sup>

(1) Title by public grant is that which is acquired in lands previously owned by the government by virtue of a formal conveyance thereof, executed by the proper officers, to a private person. This instrument of conveyance is called a "patent." At the time of the organization of the United States government, the federal government found itself in possession of various lands to which it had the fee-simple title; and since then it, as well as the governments of the various states, has acquired other lands in divers ways. Many of these lands were occupied by Indian tribes; but it was early held that the right of these tribes to the soil was merely a right to use and occupy it. This right has always been protected. It can only be divested by purchase or conquest, and our government has adopted the former method. A large proportion of the land so held was soon placed on sale by the government of the United States; and, to supervise and manage the sales, there was established what has since been known as the "General Land Office." This was at first subordinate to the treasury department, but was afterward transferred to the department of the interior. Various local land offices, under the control of the general office,

<sup>20</sup> Smith Elem. L. 200; "Taxation," — Cyc. —.

<sup>22</sup> Smith Elem. L. 201.

<sup>21</sup> Smith Elem. L. 201; and *infra*, § 232.

have been established throughout the country at convenient points. Many of the States have established similar bureaus for the purpose of managing their own landed interests. The patent is the instrument used by the government to convey the title to these lands to private persons. It is usually signed by the president, or by some one appointed to sign in his stead, and is sealed with the great seal of the United States. If the patent is properly executed, a perfect title to the property vests in the patentee. The title to more than one half of the entire land in the United States may be traced back to the government.<sup>23</sup>

(2) Title by private grant is that which is acquired in lands previously owned by a private person, by virtue of a deed of conveyance. A "deed," in the widest sense of the term, is a contract under seal. In this sense it is synonymous with a "covenant" or "specialty."<sup>24</sup> In connection with the law of real property, however, the term "deed" is used in a narrower sense, to signify an instrument, usually under seal, by which an estate in such property is granted by one private person to another private individual or to the State, or whereby an estate already thus granted is enlarged or modified. Both in England and in the United States it is provided by the statute of frauds that a written instrument is necessary for the voluntary alienation of lands, tenements, and hereditaments, or any interest in or concerning them.<sup>25</sup> In most of the American States a sealed instrument is required, although in some states it is provided that no conveyance shall be invalid for want of a seal.<sup>26</sup>

§ 220. **Classification of Deeds — Common-Law Deeds.** Deeds are usually classified into original deeds and derivative deeds. An original deed is one which creates an estate. A derivative deed is one which enlarges or modifies an estate already created. At the common law there were six principal species of original deeds: (1) Feoffment; (2) gift; (3) grant; (4) lease; (5) exchange; and (6) partition. A feoffment was a deed which created a fee-simple estate. It was accompanied by livery of seizin, or the actual corporeal delivery of the property. A gift, as a conveyance, was a deed creating a fee-tail estate. A grant, in this sense, was a conveyance of the title to an incorporeal hereditament. A lease was the conveyance of an estate less than that held by the grantor; as where one holding an estate in fee granted to another an estate for years in the property. An exchange was a deed transferring equal interests, one in consideration for the other. In case of an exchange it is the interests or estates which must be equal, as fee

<sup>23</sup> Smith Elem. L. 201, 202;  
"Public Lands," — Cyc. —  
<sup>24</sup> See *supra*, § 128.

<sup>25</sup> See *supra*, § 129.  
<sup>26</sup> Smith Elem. L. 203; 13 Cyc.  
505, 555.

simple for fee simple; not the values of the two pieces of property. A partition is a deed creating several estates out of estates in joint tenancy or in common.<sup>27</sup>

The common-law derivative deeds were five: (1) Release; (2) confirmation; (3) surrender; (4) assignment; and (5) defeasance. A release was the conveyance of an expectant interest in property to one having the estate in possession; as, for example, the transfer of the remainder or reversion to the particular tenant. A confirmation was a deed confirming or making valid a voidable estate. A surrender was a conveyance of the estate in possession to one holding the estate in expectancy. It is the counterpart of the release. An assignment was a transfer to another of one's entire interest in the property. It was usually confined to estates for life or years. A defeasance is a collateral deed which provides conditions whereby the estate created by another deed may be defeated.<sup>28</sup>

Under the statute of uses there sprung up five new forms of deed: (1) Covenant to stand seized to uses; (2) bargain and sale of lands; (3) lease and release; (4) deed to declare uses; and (5) deed of revocation of uses. A covenant to stand seized to uses was a deed by which a man covenanted or agreed to hold the property to the use of some kinsman, in consideration of blood or marriage. This operated to vest the equitable estate in the relative and by the operation of the statute of uses<sup>29</sup> the legal estate also vested. In a bargain and sale the grantor merely agreed with another that he would convey to him certain property. Courts of equity would then hold the covenantor to be a trustee for the other, and the legal title would also vest in him by the statute of uses. A lease and release did not depend for its effect upon the statute of uses, but was adopted soon after the passage of that statute. A lease of the property was made usually for one year, the lessor still holding the reversion. He then executed a release to the tenant in possession. Thus the complete title passed. A deed to declare the uses of other conveyances was, as its name implies, one specifying the use to which property conveyed by some other form of deed was to be held. A deed of revocation of uses was one used, when the power to revoke the use had been reserved, in order to accomplish such revocation.<sup>30</sup>

§ 221. **Deeds in the United States.** The forms of deed in use in the United States are of great variety, differing in the different

27. Smith Elem. L. 203, 204; 13 Cyc. 522; 2 Blackstone Comm. 309 *et seq.*

28. Smith Elem. L. 204, 205; 13 Cyc. 522, 523; 2 Blackstone Comm. 324 *et seq.*

29. See *supra*, § 203.

30. Smith Elem. L. 204, 205; 13 Cyc. 523 *et seq.*; 2 Blackstone Comm. 338 *et seq.*

states. In addition to the common-law forms, there is in general use here a deed known as the "quit-claim" deed. This is a conveyance to another of whatever title the grantor may have at the time of the conveyance. Most of the common-law deeds have been used, and many of them are still employed. The most usual common-law forms of deed here used are the feoffment, bargain and sale, and lease and release. In many states a statutory form of deed is prescribed; but this form does not necessarily supplant the old deeds. When a deed, of whatever form, conveys the title to the estate, with covenants of warranty of title, it is ordinarily referred to as a "warranty deed." A quitclaim deed is similar to a common-law release, but it differs therefrom in this: that it is not restricted to the transfer of an expectant estate to the particular tenant, but is used to release any interest whatsoever which the grantor has; and the grantees may be, and usually is, a mere stranger to the estate. The quitclaim deed operates, therefore, as an original, rather than a derivative, conveyance. In fact, it is nothing more than a conveyance of the estate, without covenants of warranty.<sup>31</sup>

31. Smith Elem. L. 206; 13 Cya. 522 *et seq.*, 552.

## CHAPTER XVII

### PROPERTY AND PROPERTY RIGHTS (CONTINUED)

#### D. Personal Property.

##### § 222. Chattels — Real and Personal.

##### 223. Choses and Their Classification.

##### 224. Corporeal and Incorporeal Personal Property.

##### 225. The Ownership of Personal Property.

##### 226. Titles to Personal Property and Their General Classification.

##### 227. Title by Original Acquisition — Occupancy, Accession, and Creation.

##### 228. Title by Operation of Law — Forfeiture, Succession, and Marriage.

##### 229. Title by Legal Process — Prerogative, Execution, and Judicial Decree.

##### 230. Title by Act of Parties — Gift, Testament, and Contract.

### D. PERSONAL PROPERTY

§ 222. **Chattels — Real and Personal.** The term “chattel” is a comprehensive one, including within its meaning every species of personal property, whether corporeal or incorporeal. Chattels are divided into two classes: (1) Chattels real, and (2) chattels personal. A chattel real is an estate in real property less than freehold, such as a term for years in land. It is also sometimes called a personal estate in real property. Chattels personal include all forms of personal property except chattels real. The word “chattel,” is said by Blackstone to be derived from the Latin “*catalla*,” meaning originally beasts of husbandry.<sup>1</sup> But the Latin term was gradually enlarged in its signification until it included all movable property; and in this sense it has been adopted into our law. The typical form of a chattel is a chattel personal. Such a chattel could not be held by tenure under the feudal system. It did not have the substantial character of real property. It was in early times the only form of personalty; but there gradually grew up a class of interests in realty which also lacked that characteristic permanence. These were the estates less than freehold. They did not come under the operation of the feudal rules relating to real property. While the property itself was permanent and substantial, these estates in it were not. The common law therefore assigned them to the class of chattels, and as they savored of the realty they were distinguished from all other personal property by the title “chattels real.”<sup>2</sup>

§ 223. **Choses and Their Classification.** Chattels personal are also known as choses, and are divided into: (1) Choses in possession, and (2) choses in action. A chose in possession is one of which the owner has the present possession and enjoyment. A

1. 2 Blackstone Comm. 385.

2. Smith Elem. L. 207, 208; “Prop-  
erty,” — Cyc. —.



chose in action was originally a piece of personal property which was out of the owner's possession, but which might be recovered by him in an action at law. The term is generally used at present, however, to mean, not the thing itself, but the right which the owner has to reduce it to possession. It has become synonymous with "right of action." But it is sometimes used in its original sense.<sup>3</sup>

If specific personal property, as a horse, for example, is detained from the owner, he has a right to have its possession restored to him by law. In such a case it is plain that either meaning of the phrase "chose in action" would apply to it. We may consider it to be the thing itself which is detained, and which may be recovered, or the intangible right which the owner has to its possession. But there are other examples which present more difficulty. Thus let us suppose that money is due to a person; in which case that person is said to have a chose in action. But inasmuch as he is not entitled to any particular, specified coins or currency, it would be difficult for him to search out any specific chattel which he could claim as his own. The chose here consists, therefore, in the mere right to have money of a certain amount paid to him; and this right is incorporeal. A still more obvious instance of the inapplicability of the original meaning of the phrase "chose in action" is found when an attempt is made to include within it the damages which may be recovered either for a breach of contract or for a tort. Here the chose must necessarily consist of the mere right, for not only is there no specific money to which the possessor of the chose can lay claim, but the damages are also ordinarily uncertain in amount. The generally accepted meaning of the term, then, is that which includes within it all those intangible rights to reduce something to possession, whether the thing itself be specific or otherwise.<sup>4</sup>

§ 224. **Corporeal and Incorporeal Personal Property.** Personal property, like real property,<sup>5</sup> may be classified into that which is corporeal and that which is incorporeal. Incorporeal personal property includes chattels real, choses in action, and a number of intangible rights in possession which are not inheritable. It is obvious that chattels real are incorporeal in their nature. The chattel real does not consist of the tangible property in which an estate less than freehold is held; for that is realty. It is rather the estate itself — the intangible interest. A chose in action, being a mere right of action, is necessarily incorporeal. There are a num-

3. Smith Elem. L. 208; "Property,"

5. See *supra*, § 189 et seq.

— Cyc. —

4. Smith Elem. L. 209. And see *supra*, § 154, c, note.

ber of intangible rights, similar in many respects to the incorporeal forms of realty, which, however, not being inheritable, are personal property. Among the principal of these are: The right to a public office; the franchise; the pension; the rights of a stock-holder in a corporation, incident to his share of the stock; patent rights; and copyrights.<sup>6</sup>

§ 225. **The Ownership of Personal Property.** The word "estate" properly has no application to personal property. Chattels are owned, not held of a superior. When, therefore, an estate therein is referred to, the term is used figuratively, in analogy to its use in connection with realty. Instead, therefore, of speaking of estates in personal property, the term most in use in connection with the interest of the owner of such property is "ownership." It will be remembered that, during the existence of the feudal system, there were certain lands which did not come under its operation, but were held independently, or allodially. Personalty was held in a way practically identical to this allodial ownership of lands; and the distinction between the terms used to indicate the interest of the allodial proprietor and that of the owner of personalty on the one hand, and that of the holder or tenant of an estate on the other, is still retained.<sup>7</sup>

The interests which may be had in personalty, however, bear a considerable analogy to those which are held in real property. Thus: The ownership of personal property may be: (1) Present or expectant; (2) several, joint, or in common; (3) for life, for years, or at will; (4) absolute or conditional. The terms used to indicate the different kinds of ownership are the same as those applied to the different estates in real property; and their meaning when applied to personalty is not changed. While anciently the distinctions mentioned above were not recognized, as movable property grew in importance they gradually came to be observed. The expectant interest in personalty may be either in remainder or in reversion. If the ownership is joint, the right of survivorship exists, as in case of real property.<sup>8</sup>

§ 226. **Titles to Personal Property and Their General Classification.** In the law of personal property, as well as in that of realty, the means by which the interest of the owner is held is called his title; and it may be acquired in either of four general ways: (1) By original acquisition; (2) by operation of law; (3) by legal process; or (4) by act of the parties.

(1) Title by original acquisition is that title to personal property which is acquired either by the operation of natural causes

<sup>6</sup> Smith Elem. L. 210; "Property,"  
— Cyc. —.

<sup>7</sup> Smith Elem. L. 210, 211.

<sup>8</sup> Smith Elem. L. 211; 16 Cyc. 599,  
615, 650.

or by the sole act of the person acquiring it. It is that title which is in its nature original, either because there has been no previous title to the property, or because there has been a break in the chain of title; the owner in question, when he acquires his title to the property, thus starting a new chain. It will be seen that this original title is the result either of an act of the party who acquires it or of natural causes.<sup>9</sup>

(2) Title by operation of law is that title to personal property which is acquired by the sole operation of legal principles.<sup>10</sup>

(3) Title by legal process is that which is acquired by virtue of the act of a court or public officer. Such a title is often classified under the head of title by operation of law, but the two are distinct.<sup>11</sup>

(4) Title by act of the parties is that which is acquired by virtue of the concurrent acts of two successive owners of the property. In acquiring title by act of the parties, it is necessary that the acts of two successive owners concur. It sometimes happens that the principal act is that of the prior owner, the act of his successor consisting merely of an acceptance of the title. In such cases, however, it is plain that the act of acceptance is as necessary to the transfer of the title as is the act of grant, for the law will not compel a person to hold property without his consent.<sup>12</sup>

§ 227. **Title by Original Acquisition — Occupancy, Accession, and Creation.** Title by original acquisition is of three general kinds, namely: (1) Title by occupancy; (2) title by accession; and (3) title by creation.

(1) Title by occupancy is the title which one may have to a chattel which, previous to its acquisition, was without an owner. Title by occupancy is usually acquired either: (a) In animals *feræ naturæ*, or wild animals. So long as such animals remain untamed, there can be only a qualified title to them. They may be captured and used, but if they regain their liberty all ownership in them is lost.<sup>13</sup> (b) In things lost or abandoned by the previous owner. He who first assumes control over them takes a valid title. If they are lost, however, without abandonment, the finder acquires a qualified title merely, good as to all but the true owner; and, if the latter cannot be found, and he does not appear to claim his property within a reasonable time, he will be presumed to have

9. Smith Elem. L. 212; and *infra*, § 227.

10. Smith Elem. L. 212; and *infra*, 228.

11. Smith Elem. L. 212, 213; and *infra*, § 229.

12. Smith Elem. L. 212, 213; and *infra*, § 230.

13. Smith Elem. L. 213. See *supra*, § 72; and 2 Cyc. 306 *et seq.*

abandoned it.<sup>14</sup> (c) Goods lawfully captured in war. Such goods ordinarily vest in the government at the moment of the capture.<sup>15</sup>

(2) Title by accession is the title which one acquires to whatever is produced by property already his own. Common examples of title by accession are that to the young of animals or to the fruit of trees.<sup>16</sup>

(3) Title by creation is the title which is acquired, by one who first brings a thing into existence, to the thing created. One may ordinarily acquire by creation the title to mechanical inventions and to literary products. Unless he surrenders his right to the results of his creation, no one has any legal power to infringe upon it. When, however, he puts the product on the market for sale or distribution, he is held to dedicate it to the public, unless it is made the object of patent or copyright. A patent is said by Chancellor Kent to be "a grant by the state of the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend, an invention." Following the general plan of this definition, it may be said that a copyright is a grant by the State of the exclusive right to multiply and dispose of, and to authorize others to multiply and dispose of, copies of a literary production.<sup>17</sup>

§ 228. **Title by Operation of Law — Forfeiture, Succession, and Marriage.** The principal forms of title by operation of law are these: (1) Title by forfeiture; (2) title by succession; and (3) title by marriage.

(1) Title by forfeiture is that title which is acquired to goods which the previous owner is obliged to give up as a penalty for some crime, tort, or breach of contract. For the punishment of crime, the fine is a method very frequently resorted to. The title which the state acquires by virtue of this and similar penalties is, of course, by forfeiture. Another example of this form of title exists where there has been a conditional sale of a chattel. Upon a breach of condition, the property reverts or is forfeited to the vendor.<sup>18</sup>

(2) Title by succession is that title to property which is acquired either by the state or by an individual after the death of the previous owner. Three forms of succession are often given by writers: (a) That of the government to the property of one who dies leaving no will, and no one capable of taking it; (b) that of the successive members of a corporation to the property of the corporation; and (c) that of the heirs or next of kin, or devisees or lega-

14. Smith Elem. L. 214; 1 Cyc. 3; 19 Cyc. 535.

15. Smith Elem. L. 214; "War," — Cyc. —.

16. Smith Elem. L. 214; 1 Cyc. 222; 2 Cyc. 309.

17. Smith Elem. L. 214; 9 Cyc. 889; 30 Cyc. 803.

18. Smith Elem. L. 215; 19 Cyc. 1355; "Sales," — Cyc. —.

tees, to the property of a deceased person.<sup>19</sup> Of the second form, it is sufficient to remark that, under the American conception of a corporation, the property thereof does not at any time vest in the members who compose it, but in the corporation itself — the intangible entity, which continues to exist, independent of the life of the members or stock-holders. This phase of succession need not, therefore, be considered. The first and third forms may be classed together as succession after death, which will form the topic of the succeeding chapter.<sup>20</sup>

(3) Title by marriage is that which is acquired in personal property by virtue of the marriage relation. As we have seen, title by virtue of the marriage relation has been rendered to some extent obsolete by the Married Women's Acts.<sup>21</sup>

§ 229. Title by Legal Process — Prerogative, Execution, and Judicial Decree. Title by legal process may be conveniently considered under three subdivisions: (1) Title by prerogative; (2) title by execution; and (3) title by judicial decree. Title by prerogative is that form of title to personal property which is acquired by the state in the exercise of its sovereign powers. Title by execution is that title to property which is acquired when such property is sold to satisfy the judgment of a court of law. Title by judicial decree is that which is acquired to property transferred by virtue of a decree of a court of equitable jurisdiction. Title by prerogative is the counterpart of title by eminent domain. For example, the title which the government acquires in taxes collected for its support would be by prerogative. Of titles by execution and by judicial decree it is only necessary to say that they may be acquired to interests in personal property as well as to those in realty.<sup>22</sup>

§ 230. Title by Act of Parties — Gift, Testament, and Contract. Title by act of parties is also of three principal kinds: (1) Title by gift; (2) title by testament; and (3) title by contract.

(1) Title by gift is that title which is acquired by virtue of a voluntary transfer of the property from the previous owner, without consideration. Gifts are of two kinds: (a) Gifts *inter vivos*; and (b) gifts *causa mortis*. A gift *inter vivos*<sup>23</sup> is one which is made irrespective of the death of the donor. A gift *causa mortis*<sup>24</sup> is one which is made at a time when the donor's death is imminent, and which is revoked by operation of law if he recovers. A gift is a gratuitous transfer of personal property. Ordinarily this is made when both parties are living, and with no reference whatever to death. But when the donor is on his deathbed a gift then made is

19. Smith Pers. Prop. p. 108.

20. Smith Elem. L. 215; and *infra*,

§ 231 *et seq.*

21. See *supra*, § 154.

22. Smith Elem. L. 216; and *supra*,

§§ 215-217.

23. "Between the living."

24. "In contemplation of death."

quite different in its legal effect from a gift *inter vivos*. It is, in a certain sense, a testamentary disposition of the property. It will revoke a previous will, so far as it is inconsistent therewith; but if the donor recover it is of no effect whatever. Delivery is an essential element of every valid gift. A mere promise to give is of no legal effect.<sup>25</sup>

(2) Title by testament is the title to personal property acquired at the death of the testator by virtue of his last will. This will be considered in the following chapter.<sup>26</sup>

(3) Title by contract is the title which is acquired as the result of the performance of an agreement between successive owners of the property; as in the case of a sale of goods.<sup>27</sup>

25. Smith Elem. L. 217; 20 Cyc. 1189.

26. See *infra*, § 232.

27. See *supra*, § 139.

## CHAPTER XVIII

### PROPERTY AND PROPERTY RIGHTS (CONTINUED)

E. Succession After Death.

§ 231. Succession in General.

232. Testate Succession—Wills.

233. Intestate Succession—Descent and Distribution.

234. Escheat.

235. Executors and Administrators.

#### E. SUCCESSION AFTER DEATH

§ 231. **Succession in General.** The law of succession is that branch of the substantive law which regulates the disposition of property after the death of the owner. It is divided into two general divisions: (1) The law of testate succession, and (2) the law of intestate succession. Testate succession is that form of succession which is governed by the last will of the deceased owner. When the owner has left a valid will, he is referred to as a "testator," or, if a woman, a "testatrix." Intestate succession is that form of succession which, in the absence of a last will, is governed by legal rules of descent and distribution. The owner who has died without leaving a valid will is called an "intestate."<sup>1</sup>

It is supposed that in the most primitive times the conditions of holding property and of transmitting it to others were similar to those which exist among many of the savage tribes of the present day. There is in these tribes ordinarily no such thing as individual ownership in land; the soil is held by the tribe, and hence the question of its transmission after death could with difficulty arise. With regard to personalty, such property was usually limited to the results of the hunt and to the weapons which were used for hunting and for purposes of defense. The friends of a deceased owner of such property believed that, unless it could be conveyed in some way to him in the spirit land, he would lack the implements necessary for his eternal happiness. Hence, upon his death, the property was killed, or broken, to render its condition proper for admission to the happy hunting grounds. There was no attempt, probably, to secure such chattels to the representatives of the dead man. The first step in the development of a law of succession was toward intestate succession. In the early times this took various forms. In some tribes the succession was through the female line; in others, through males. Among a certain race of South Australia, the rule is that, if a man dies without offspring,

<sup>1</sup> Smith Elem. L. 219; and *infra*,  
§§ 232, 233.

his personalty goes to the son of his brother. This is an illustration of the peculiar ideas which were once held as to the proper successor to the property of a deceased person. Except in the most savage races, however, there was always some provision for the disposition of property after death. The right to make a will was of later growth, although traces of it are found early in history. It does not usually exist except in civilized states. In Greece it was introduced by Solon, while in Rome it was recognized in the laws of the Twelve Tables.<sup>2</sup>

While the feudal system was in operation, the allodial lands were inheritable, passing usually down through the male line. But the fiefs or feuds were originally, on the continent, held for life only. When they became inheritable, there was adopted what we know as the "right of primogeniture," which was a right on the part of the eldest son of the owner to succeed to that owner's feudal holdings. The right of primogeniture has profoundly influenced the English law of succession, although it has affected the American law but little.<sup>3</sup>

§ 232. *Testate Succession — Wills.* A will is an instrument by which a person directs the succession of his property after his death. Until death it is subject to revocation by the person making it. So far as the will relates to real property, it is called a "devise"; if it disposes of personalty, it is to that extent referred to as a "testament," and the gift of personalty is called a "legacy." The instrument itself is often called a "last will and testament." In England the right to dispose of personal property by will is supposed to have existed from the earliest times. But it has not been an unlimited power; for, according to Blackstone and Glanvil, so late as the reign of Henry II, a man's goods were divided into three equal parts, one of which went to his lineal descendants, another to the wife, and the third was at his own disposal. As to the disposal of real property by will, it is supposed that the right existed to some extent before the Norman Conquest, but that, upon the introduction of the feudal system at that time, it was suspended until again revived by the statute of wills passed in 1543. Since that time various other statutes have been passed to regulate the subject of testate succession, the general effect of which has been to allow the testator practically the full control of the succession. In this country his right to regulate it is limited only by such antecedent rights as those of dower, curtesy, etc., and the rights of creditors.<sup>4</sup> The statutes, varying more or less in the different States, prescribe certain formalities in the execution of a will and these must be complied with or the instrument will be

2. Smith Elem. L. 219, 220.

3. Smith Elem. L. 220.

4. Smith Elem. L. 221; "Wills,"

— Cyc. —.



invalid, and the property will descend as if no will at all had been made.<sup>5</sup>

§ 233. **Intestate Succession — Descent and Distribution.** "Descent," or "inheritance," is a term properly used only in reference to the succession of real property. The most approved term to indicate the succession of personal property is "distribution."

The descent and the distribution of property are governed in the States of the United States by statutes. In most States there exist two distinct statutes, one known as the "statute of descents" and the other as the "statute of distributions." Those who take realty under the statute of descents, as heirs, are often different from those who take personal property by distribution. It is the theory of the law that the rules of descent and distribution make a disposition of the property which is what the average man would provide were he to make a will. It is his family which has the first claim upon him while living, and it is the family which is usually favored by the statutes relating to succession. Inasmuch, however, as the statutes of descent and of distribution of the different States differ widely in their provisions, it would be impossible to present them in detail. In most States personalty does not go to the same set of successors as does real property. There are, however, a few States where the heir takes the chattels as well.<sup>6</sup>

§ 234. **Escheat.** If the owner of property dies intestate, and without lawful heirs or distributees, his property, as we have seen, escheats to the State.<sup>7</sup> In most of the States of the Union the proceeds of property which has thus escheated are dedicated to the cause of public education. The rule of escheat is probably derived from the feudal system. If, under that system, a tenant received a grant to himself and his heirs, when neither he nor his heirs longer existed, the estate no longer existed, and the property reverted back to the lord of the fee. Under the old common law, therefore, the term "escheat" was applied properly only to real property. In this country the State stands in a position similar to that of the lord of the fee, taking, not by any feudal rule, but by virtue of its sovereignty, such property as has no other owner; and the rule applies to personal as well as to real property.<sup>8</sup>

§ 235. **Executors and Administrators.** An executor is one who is appointed by a testator in his last will to carry out the directions contained in that instrument. An administrator is one who is appointed by a proper court to take charge of the property of a deceased person, and distribute it according to the will of the deceased or according to law.<sup>9</sup>

5. See "Wills," — Cyc. —.

6. Smith Elem. L. 222; 14 Cyc. 1.

7. See *supra*, § 207.

8. Smith Elem. L. 223; 16 Cyc.

548.

9. Smith Elem. L. 223.

The term "personal representative" is a general one, indicating either an executor or an administrator. The appointment of an executor is one of the usual elements of a will. But if the deceased died intestate, or if, in his will, no one is selected to settle the estate, or if the person selected declines to serve in such a capacity, it is the duty of the court which has jurisdiction over such matters to appoint an administrator. If there is a will, the administrator is guided by its directions. He is then called an "administrator with the will annexed." In the absence of a will, he finds his rules of action in the statutes. In either case, however, he is under the direct control of the court which has appointed him, and is instructed by such court in all matters of doubt. The title to the real property of a deceased person vests, at the time of the death, in the heir or devisee. But the distributee or legatee does not have the title to the personalty vested in him until later. That title goes at once to the executor or administrator, who holds it in trust until the estate is closed, when it is passed over by him to those who are entitled to it.<sup>10</sup>

10. Smith Elem. L. 223, 224; 18 Cyc. 1.

## CHAPTER XIX

### PARTNERSHIPS, CORPORATIONS, AND OTHER ASSOCIATIONS

- § 236. Partnerships.
  - a. Definition and Nature.
  - b. Rights and Liabilities of Partners.
  - c. How Partnerships Are Formed — Estoppel.
  - d. Mutual Agency.
  - e. Limited Partnerships.
  - f. Partnership Associations Limited.
- 237. Voluntary Associations.
- 238. Joint Stock Companies.
- 239. Corporations.
  - a. Definition and Nature.
  - b. Public and Private.
  - c. How Created.
  - d. Board of Directors or Trustees.
  - e. Rights of Stock-Holders.
  - f. Liabilities of Stock-Holders.
  - g. Duration of Existence.

§ 236. Partnerships — a. Definition and Nature. A partnership or firm is an association founded upon the contract of two or more persons to combine property, labor, or skill in business as principals for the purpose of joint profit.<sup>1</sup> Another definition is: "A contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions."<sup>2</sup> It frequently happens that, for the conduct of a business enterprise, more capital is necessary than is possessed by the individual who wishes to engage in that enterprise. There thus arises a necessity for the combination of capital belonging to two or more persons. Various forms of association for business purposes thus arise, differing from each other according to the different forms of agreement into which the parties who thus combine their resources enter. The most ancient and usual form of association is the partnership, as above defined.<sup>3</sup>

b. Rights and Liabilities of Partners. Every member of a firm, unless restricted by the terms of the partnership articles, is entitled, jointly with his copartners, to the full control of the partnership property and of the partnership business; and every member of a firm is personally liable for all the partnership debts.<sup>4</sup>

When two or more persons enter into a partnership relation, the law imposes upon them certain peculiar liabilities and rights which

1. Smith Elem. L. 259.

4. Smith Elem. L. 260; 30 Cyc.

2. 3 Kent Comm. 23; 30 Cyc. 349. 445, 477 *et seq.*

3. Smith Elem. L. 259; 30 Cyc.

are not necessarily mentioned in the agreement by which the association is formed. In their relations to the partnership property, the law proceeds upon the theory that theirs is in the nature of a joint ownership. One partner cannot, therefore, deprive his copartner of any element of the free control over the firm property to which one joint owner is entitled. Furthermore, one partner has a right to control the partnership business. Both partners are principals. Each is entitled to control the entire partnership affairs. If, in the exercise of such control, partners cannot agree, the only remedy is a dissolution of the firm. As the correlative of this complete control of the partnership affairs vested in each partner, the law imposes upon each member of the partnership complete liability for all the partnership debts. He may be compelled to pay them not merely to the extent of the amount which he has contributed to the capital, not merely his share of them, but all of them to the same extent as though they were his individual debts.<sup>5</sup>

c. **How Partnerships Are Formed — Estoppel.** A true partnership can be formed only by the contract of its members, which contract is subject to the rules governing contracts generally.<sup>6</sup> But one who is not in reality a partner may be held liable to third persons as a member of the firm, if he so conducts himself as to lead such third persons to believe that he is a partner, and to rely upon his responsibility. He is then said to be a partner by estoppel.<sup>7</sup> The doctrine of estoppel has been referred to in a previous chapter.<sup>8</sup> Its application here will be readily appreciated. The liability of a partner for the partnership debts is somewhat extraordinary. Persons dealing with a firm have a right to rely upon the personal responsibility of every member of the partnership. In many cases a particular partner is the only member of the firm who has property which may be levied upon in case the firm fails to meet its obligations. It is to him, then, that business men will look for the payment of the partnership debts. But, although a person of this description is not actually a member of the firm, having entered into no contract of copartnership, contributed no capital, and having no control over the partnership affairs, if he so conducts himself as to lead a person dealing with the firm to believe that he is a partner, and such person is induced to give credit to the firm by his reliance upon this particular person's responsibility, that person will not afterward be heard to

5. Smith Elem. L. 260; 30 Cyc. 334.

6. Smith Elem. L. 261; 30 Cyc. 352.

7. Smith Elem. L. 261; 30 Cyc. 381, 390.

8. See *supra*, § 147, b.

deny the responsibility which he has, by his own acts or negligence, assumed.<sup>9</sup>

Although such a person may thus stand in the position of a partner as to third persons, he does not, by his assuming this responsibility, actually become a member of the firm. A partnership is based upon the contract of the partners, and as a rule a man cannot, by estoppel, assume any of the rights which a true member of the firm might have.<sup>10</sup>

**d. Mutual Agency.** Every partner, unless restricted by the partnership articles, is the agent of the firm for the transaction of all matters within the scope of the partnership business. A large proportion, therefore, of the principles of the law of partnership, have their basis in the law of agency. From the fact that each partner has the control of the partnership property and of the partnership business, it necessarily follows that his action, within the scope of the partnership business, must bind the firm.<sup>11</sup>

**e. Limited Partnerships.** A limited partnership is an association, authorized by statute in most of the States, some members of which are liable, not to the full extent of the firm debts, but only to the extent of the amount which they contribute to the capital of the firm. In every limited partnership there must be, at least one partner who is liable to the full extent of the firm debts. No such thing as a limited partnership existed under the common law. There has always been a desire, however, on the part of persons entering into partnership, to limit their liability; and this desire has given rise to statutes in nearly all of the American States providing for the formation of various associations which differ from ordinary partnerships because in them the liability of some or all of their members is limited. Of these various associations, the limited partnership is the one most universally provided for. Statutes usually provide that, for the formation of such partnerships, it shall be necessary that the fact of its organization be announced to the public in the public press; that the amount of capital contributed by the partners whose liability is limited be named; and that there shall be at least one person in the firm whose liability is unlimited. In order that the limitations upon the liability of the other partners shall hold good, the statute must be strictly complied with; otherwise, they are individually liable to the full extent of the firm debts.<sup>12</sup>

**f. Partnership Associations Limited.** The statutes in some of the States authorize the formation of what are called "partnership

9. Smith Elem. L. 261; 30 Cyc. 381, 390.

10. Smith Elem. L. 261.

11. Smith Elem. L. 262; 30 Cyc. 477 *et seq.*

12. Smith Elem. L. 262, 263; 30 Cyc. 751 *et seq.*

associations limited," and which differ from the limited partnerships above mentioned. The members of these associations are liable only to the extent of the amount which they contribute to the capital of the association. In order that the public be constantly reminded of the fact that the members of these associations have only a limited liability, it is usually required that, in addition to the advertisement of the organization of the association, the name of such association, whenever it is used, shall have the word "Limited" annexed to it. If the name of the association is used, either in advertising matter or in correspondence, without the use of this word, a person not having actual notice of the nature of the association may hold the individual partners liable to the full amount of the association debts.<sup>13</sup>

§ 237. **Voluntary Associations.** A voluntary association is an unincorporated body usually organized for social purposes, and differing from a partnership in that its primary object is not the joint pecuniary profit of its members. Members of such a body are liable individually for such debts of the association as they expressly or impliedly authorize, and for those only. An example of a voluntary association would be an unincorporated social club or literary society. In such a club or society it frequently happens that a constitution is framed and signed by its members, and frequently by-laws are drawn up and adopted. If, in the constitution or by-laws of the association, certain officers of the association are authorized to incur debts on its behalf, the law holds that all who sign or vote for the adoption of the constitution and by-laws make themselves liable for debts contracted in pursuance of their provisions. Where no express authorization of this character exists, it is the rule that all who vote in favor of the particular expenditure make themselves liable on the principles of agency.<sup>14</sup>

§ 238. **Joint Stock Companies.** A joint stock company is an unincorporated association, usually organized for business purposes, differing from a partnership in that transferable stock is issued to its members, and by this stock their interests are held. It is a principle of the law of partnership that no new member can be taken into the firm without the consent of all the present members. In case of a joint stock company, however, the interest of a member may be transferred to a third person without any reference to the wishes of the other members of the company. So far as liability is concerned, the joint stock company is governed by the same rules as the ordinary partnership, except in so far as change has been made by statute.<sup>15</sup>

13. Smith Elem. L. 263; 30 Cyc. 753 *et seq.*

14. Smith Elem. L. 264; 4 Cyc. 299; 7 Cyc. 258.

15. Smith Elem. L. 264; 23 Cyc. 466.

§ 239. Corporations—*a. Definition and Nature.* A corporation is an artificial person, created by the law, and having an individuality distinct from the members who compose it; its powers being limited to those granted to it by the law by which it is created. The corporation is the antithesis of the partnership. The members of a firm have full control over the partnership business; the stock-holders of a corporation have practically no control over the conduct of corporate affairs. The members of a partnership are individually liable to the full extent of the partnership debts; the stock-holders of the corporation are, in the absence of statute, liable only to the amount of their capital stock. A member of a partnership cannot sell his interest to another, so as to introduce a third person into the firm, unless his copartners consent, and even then a new partnership is formed; a stock-holder of a corporation may transfer his interest to an outsider by the mere sale of his capital stock, and this without affecting the identity of the corporation.<sup>16</sup>

Another definition of a corporation aggregate is: "A collection of individuals united, by authority of law, into one body, under a special denomination, with the capacity of continuous succession, and of acting in many respects as an individual."<sup>17</sup> Every such corporation consists of: (1) A collection of individuals, and (2) a legal entity, which is, for many purposes, in contemplation of law, separate and distinct from the members who compose it. Thus, for the purpose of acquiring, holding, and conveying property, contracting obligations, incurring liabilities, suing and being sued, a corporation is regarded as a legal entity or artificial person, separate and distinct from the members who compose it. For example: (a) The property of a corporation is owned by the corporation, and not by the individual members. (b) Conveyances of such property must be made by the corporation, and cannot be made by the members as individuals. (c) Suits on causes of action accruing in favor of or against a corporation must be brought by or against the corporation, and not by or against the members individually. (d) A corporation may take from and convey to its members, and contract with them, and may sue them and be sued by them. But that a corporation is thus a legal entity, separate and distinct from its members, is a mere legal fiction, introduced for the convenience of the corporation in transacting business, and of those who do business with it; and when the

16. Smith Elem. L. 265; 10 Cyc. 143 *et seq.*

17. Clark Corp. (2d ed.) 1.

We are speaking here of corporations aggregate, that is, consisting of more than one member. There is

such a thing as a corporation consisting of one member only, called a corporation sole, but they are rare. See 10 Cyc. 148; Clark Corp. (2d ed.) 23.

fiction is urged to an intent and purpose not within its reason and policy, it will be disregarded, and the fact that the corporation is really a collection of individuals will be recognized by the courts.<sup>18</sup>

**b. Public and Private.** Corporations are either public or private. Public corporations are such as are created for the purpose of government and the management of public affairs, like cities, villages, etc., called "municipal corporations," and banks, hospitals, and the like, founded by the state and managed by it for governmental purposes. Private corporations are such as are created for private purposes, as manufacturing, banking and railroad companies, and the like, and private religious and eleemosynary corporations — eleemosynary corporations being such as are formed for the purpose of carrying out some charitable object, as a hospital, college, etc., founded by private persons.<sup>19</sup>

**c. How Created.** Individuals, under their right to make contracts and acquire property, have an absolute right to form partnerships, including unincorporated joint stock companies, for the purpose of carrying on any lawful business. For this purpose no authority from the state is necessary. But they have no such right to form a corporation, and conduct their business in that privileged mode, by a mere agreement between themselves. It is essential to the existence of a corporation that it shall be created or authorized by the state. In this country such bodies can be created only by or under legislative enactment. In the absence of restrictions in the constitution of the particular jurisdiction they may be created by or under either special or general laws.<sup>20</sup>

It has already been stated in a previous chapter that the right to exist as a corporation is a franchise, and that all the powers which the corporation may possess are also franchises, and it has been explained that a franchise is a branch or part of sovereign authority delegated to a private person. Under the early common law, these franchises were in many instances granted to private individuals, but in this country they are usually possessed only by corporations. The attitude of the early common law toward corporations was that of discouragement. In order to secure a corporate franchise, it was necessary to obtain a special act of parliament granting it. In later times, however, particularly in this country, the power incident to large combinations of capital to develop the resources of the country was recognized, and corporations have since been more favorably regarded. While

18. Clark Corp. (2d ed.) 1, 2; 10 Cyc. 145.

19. Clark Corp. (2d ed.) 23; 7 Cyc. 284; 10 Cyc. 1; 21 Cyc. 1105; 28 Cyc. 117.

20. Clark Corp. (2d ed.) 29 *et seq.*; 10 Cyc. 201 *et seq.*, 219 *et seq.*



in early times it was necessary to obtain a special act or charter from the legislative body, at present, in all of the United States, laws have been passed providing a method for the organization of corporations without any recourse to the legislature. These acts are commonly referred to as "General Laws of Incorporation." The enormous growth of corporations in this country has had much to do with their material development. In order to organize a corporation under the general laws, it is usually necessary for those who wish to become its members to first sign an agreement setting forth the name, objects, and terms of the proposed company. This agreement is called the "Articles of Association." These articles must ordinarily be filed with the secretary of state, and a duplicate copy must be deposited with some officer, usually the clerk, of the county where the corporation proposes to have its principal office.<sup>21</sup>

**d. Board of Directors or Trustees.** The business of a private corporation is necessarily conducted through agents. These agents are usually organized into a body called the "board of directors" or the "board of trustees." The board of directors usually has power to manage the general affairs of the corporation. The officers of the corporation, with subordinate powers, are usually elected by this board.<sup>22</sup>

**e. Rights of Stock-holders.** The stock-holders of a private corporation usually have power to choose the directors, but have no further control over the conduct of the business. Their relations to the corporation are merely contract relations. They contribute their capital, and, in return therefor, are entitled to share in the profits of the concern. This necessarily follows from the nature of the corporation as a legal entity. The stock which is issued to the members is in the nature of a contract between the artificial personality which is called the "corporation" and the stock-holders. The fact that the stock-holders have power to select the directors does not change their relations to the corporation. This is merely a provision by the law for the selection of the agents who are to carry on corporate business.<sup>23</sup>

**f. Liabilities of Stock-holders.** In the absence of a statute, the stock-holders of a corporation are liable for the debts of the company only to the extent of the face value of the stock which they hold. If this amount has been paid in, they are exempt from further liability. This principle also follows from the nature of the corporation itself. The stock-holders are not identified with it, and are not liable for its debts, except so far as they have made

21. Smith Elem. L. 286; 10 Cyc. 219 *et seq.*

22. Smith Elem. L. 267; 10 Cyc. 736 *et seq.*

23. Smith Elem. L. 267; 10 Cyc. 954 *et seq.*

themselves liable by their contract of membership.<sup>24</sup> Frequently, however, the statutes impose an additional liability upon stockholders.<sup>25</sup>

**g. Duration of Existence.** Statutes in this country usually limit the duration of the existence of private corporations. In the absence of such limitations, however, their existence is perpetual. While it has been the tendency of American legislatures to encourage the formation of corporations, it was early found desirable to maintain over them a certain degree of legislative control. In the famous Dartmouth College case it was held that a charter granted to a private corporation contains a contract which, under the constitution of the United States, cannot be impaired. Therefore, if some degree of legislative control is not reserved by the legislature, the corporation becomes independent, and cannot afterward be restricted in its powers. Most States, therefore, in providing for the organization of corporate bodies, reserve the right to modify the charters at will. The limitation of the time of their existence is now quite a universal provision.<sup>26</sup>

<sup>24</sup> Smith Elem. L. 268; 10 Cyc. 649 *et seq.*

<sup>25</sup> See 10 Cyc. 663 *et seq.*  
<sup>26</sup> Smith Elem. L. 268.



**PART III**  
**THE ADJECTIVE LAW**



## CHAPTER XX

### REMEDIES

- § 240. Scope of the Adjective Law.
- 241. Extra-Legal and Legal Remedies.
- 242. Extra-Legal Remedies.
- 243. Legal Remedies — Penal and Civil.
- 244. Civil Remedies — Common-Law and Equitable.
- 245. Ordinary Common-Law Remedies — Restoration — Damages.
- 246. Extraordinary Common-Law Remedies — Mandamus, Quo Warranto, Prohibition, and Habeas Corpus.
- 247. Equitable Remedies — Injunction, Specific Performance, etc.

§ 240. *Scope of the Adjective Law.* The adjective law concerns itself: (1) With the remedies applied when a legal right has been violated; and (2) with the methods of procedure by which those remedies are administered. The prospect of the application of these remedies is the chief incentive to obedience to the municipal law, and therefore constitutes its principal sanction. Pursuing again the analogy between the methods of law and of medicine, we may say that the remedies of the law are the materials which are designed to heal the wounded rights of individuals. These remedies may be considered and classified without reference to the methods of their application; but, to be of service, they must be applied. There must be first a determination of the facts in the case, or, in other words, a trial. After this, there must be a selection of the appropriate remedy, and a decision as to the quantity to be applied. The law governing the application of these remedies is called the "Law of Procedure." To the consideration, therefore, (1) of the remedies of the law, and (2) of the methods of procedure, we may now direct our attention.<sup>1</sup>

§ 241. *Extra-Legal and Legal Remedies.* A remedy, in the legal sense, is the means which the law employs, or allows to be employed, to protect legal rights and to redress legal wrongs. Remedies, in this sense, are either: (1) Extra-legal; or (2) legal. They are extra-legal when they are applied by the injured person, either with or without coöperation of other persons. They are legal when they are applied through the agencies of the government. Extra-legal remedies are those which the parties concerned are permitted by the law to apply, while legal remedies are those which the law itself applies through its own agencies. Extra-legal remedies are few in number, and are generally allowed only in cases of urgent necessity, as shown in the following section.<sup>2</sup>

1. Smith Elem. L. 234.

2. Smith Elem. L. 234, 235.

§ 242. **Extra-Legal Remedies.** Extra-legal remedies are of three classes: (1) Those which may be applied by the sole act of the injured person, including: (a) Self-defense; (b) recaption or reprisal; (c) entry; (d) abatement of nuisances; and (e) distress; (2) that which is applied by the injured party and the wrong-doer jointly, viz. accord and satisfaction; (3) that which is applied by the injured party and the wrong-doer, with the co-operation of a third person, viz. arbitration and award.<sup>3</sup>

Self-defense is the means by which a person whose right is threatened himself repels the anticipated wrong. It has been seen that it is the right of one who apprehends a personal wrong from another to defend himself, even, in some cases, to the extent of taking the other's life. He has, moreover, the right to defend, not only himself, but his wife and his children; and he may also defend his property, when an injury to it is threatened. It is clearly justifiable, for example, to use force to prevent a trespass upon realty. The degree of force which may be employed is, however, less in such cases than in cases where an injury to the person is feared; and, to prevent the violation of a mere property right, life must not be taken.<sup>4</sup>

Recaption or reprisal consists of the retaking of persons or personal property by one who, having a legal right to the custody or possession of such persons or property, has been deprived of such custody or possession. A man may lawfully follow and retake property which has been wrongfully taken from him whenever he can do so without endangering the public peace, and without trespassing on the lands of one who is not privy to the unlawful taking.<sup>5</sup>

Entry, as a legal remedy, is the taking possession of lands by the person entitled to such possession, when wrongfully excluded therefrom. The remedies of recaption and entry are of the same nature, differing only in the object recovered by them. If this is a person or personal property, the remedy is recaption; if real

3. Smith Elem. L. 285.

There were, at common law, two peculiar remedies which were applied by the pure operation of law. These were called "retainer" and "remitter." Retainer was allowed when the executor or administrator of an estate was also a creditor of the deceased. It was the right of such an executor or administrator to retain enough of the assets to pay his own debt, and these became his by operation of law. Remitter was the remedy which was applied when one

having as good title to a piece of property, but who had been ousted of possession, afterward came into possession under a defective title. He was then said to be remitted to his prior good title, and held under it thereafter. Neither of these remedies is of any practical importance in this country.

4. Smith Elem. L. 286. See *supra*, §§ 88, b, 89, j; 102, c; 106.

5. Smith Elem. L. 286, 287; 3 Cyc. 1053, 1078; "Trespass," — Cyc. —

property, it is entry. Entry, as well as recaption, must not go so far as to disturb the public peace.<sup>6</sup>

The abatement of a nuisance, as we have already seen, is the removal of the cause of such nuisance by a person who would be injured by its continuance. This, like the remedy of self-defense, is preventive in its character. It is also subject to the rule that it must not cause a disturbance of the peace. The privilege of abatement is vested in him only who sustains, or would sustain by the continuance of the nuisance, some peculiar injury not shared by the public in general.<sup>7</sup>

Distress is the taking by an injured person of a personal chattel belonging to the wrong-doer to secure the satisfaction of the injury. In this country distress is not usually permitted, except in two instances: When a tenant fails to pay rent due, the landlord may seize any movable property, with certain exceptions, which is rightfully in the tenant's possession, whether it be his own or not, and hold it until the rent is paid.<sup>8</sup> Also, when cattle of one man stray upon the lands of another—that is, when they are damage feasant, as it is said—the latter may distrain them, and retain possession of them until he is compensated for the damage sustained.<sup>9</sup> The common-law right of distress is somewhat modified by statutes in the different states.

An accord is an agreement between the wrong-doer and the injured person to settle the claim of the latter in a certain specified way. A satisfaction is the act of fulfilling or satisfying the terms of the accord. The law encourages this form of settlement, when it is practicable, because it tends to decrease litigation. An accord not followed by a satisfaction is of no legal effect, because to allow it to take the place of the original claim would be merely to substitute one action for another. But an accord and satisfaction together may be made in settlement of claims growing out of any injuries not of a criminal nature.<sup>10</sup>

Arbitration is the trial of a controverted claim before one or more third persons selected by the parties for that purpose. The persons before whom the claim is tried are known as "arbitrators," the act of referring the dispute to them is called a "submission," and their decision is an "award." A mere agreement to arbitrate will not be specifically enforced, although damages may be recovered for a refusal to carry out the agreement. When, however, parties have deliberately agreed to submit their con-

6. Smith Elem. L. 287; 13 Cyc. 711; 24 Cyc. 1391; "Trespass," —  
Cyc. —.

7. Smith Elem. L. 287.

8. Smith Elem. L. 287, 288; 24 Cyc. 1280 *et seq.*

9. Smith Elem. L. 288; 2 Cyc. 400  
*et seq.*

10. Smith Elem. L. 288; 1 Cyc. 305.



troversy to arbitrators, and the matter has been determined by them, and a formal award made, a court of equity will compel the parties to comply with the terms of the award, and a suit upon the original claim will be barred.<sup>11</sup>

§ 243. **Legal Remedies — Penal and Civil.** Legal remedies — that is, those which are applied through the agencies of the state — are either penal or civil. A penal remedy is one which consists of punishment for the commission of a crime. A civil remedy is one designed to prevent or redress the violation of a private right. Penal remedies, or modes of punishment for crime, have already been mentioned. It will be remembered that they usually take the form of fines, imprisonment, or capital punishment.<sup>12</sup>

§ 244. **Civil Remedies — Common Law and Equitable.** Civil remedies are of two general classes: (1) Those which are administered by courts of common law; and (2) those administered by courts of equity. As we have seen, one of the chief reasons for the development of the court of chancery in England was that the common-law remedies were inflexible, and therefore inadequate to meet the needs of a growing civilization. In the common-law courts a judgment was rendered either for the plaintiff or the defendant, and, if for the plaintiff, for a certain amount. Equity aimed to remedy this defect of the common-law machinery by directing specifically whatever seemed necessary to do justice between the parties. Equitable remedies are naturally, therefore, numerous, and do not easily lend themselves to classification. On the other hand, common-law remedies are few, and clearly defined.<sup>13</sup>

§ 245. **Ordinary Common-Law Remedies — Restoration — Damages.** Common-law remedies are either ordinary or extraordinary. The principal ordinary common-law remedies are: (1) Restoration; and (2) the award of damages.

Restoration is the means by which specific property, of whose possession the owner has been deprived, is returned to him in pursuance of the judgment of a court of law. When property has been wrongfully taken or wrongfully detained, the common-law courts will afford relief by restoring to the injured party the specific thing. In many cases, however, the remedy afforded is the substitution of a sum of money for the goods lost. Money is a commodity of the most universal utility, and, when it seems impracticable to attempt to fully restore the injured person to his condition before his right was violated, the award of money by way of compensation is regarded as a sufficiently desirable sub-

11. Smith Elem. L. 288, 289; 3 Cyc. 568 *et seq.*

12. Smith Elem. L. 289. And see §§ 35-37. *supra*, § 93; 12 Cyc. 953.

13. Smith Elem. L. 289, 290.

As to equity generally see *supra*,

stitute. Money so awarded is called "damages."<sup>14</sup> The ordinary common-law remedy to recover personal property is the action of replevin.<sup>15</sup> An action called detinue would also lie.<sup>16</sup> The usual common-law action to recover possession of real property is ejectment.<sup>17</sup>

By "damages" is meant a sum of money recovered by an injured party from his injurer in pursuance of the judgment of a court of law. As to the purpose for which they are awarded, damages are either: (1) Nominal; (2) compensatory; or (3) exemplary.

Nominal damages are those designed merely to affirm or recognize a right which has been violated, although no actual damage is shown. As we have seen, a right may be violated without any appreciable loss. The laws often presume, however, as in the case of a trespass, that some loss has followed; and, as the loss is nominal, the damages are nominal. They consist usually of a few cents only, and are awarded in recognition of the existence of the right.<sup>18</sup>

Compensatory damages are those designed to compensate an injured person for the actual loss which he has sustained. They are the kind usually awarded. Where there has been some substantial loss, it is the object of the law to compel payment for whatever damage has been sustained. For this purpose, it is sometimes difficult to estimate the exact pecuniary loss, and a mass of law has therefore accumulated on the subject of the measure of damages.<sup>19</sup>

Exemplary or punitive damages are those designed as punishment to the wrong-doer who has committed a wrongful act in a malicious or wanton manner. In most of the States, courts are allowed to go further than mere compensation, and to award exemplary or punitive damages, or smart money. Although these damages are paid to the injured person, he does not receive them because he is entitled to them for any loss sustained, but because, when one has been guilty of a malicious or wanton act, public policy is supposed to demand that he be compelled to pay more than mere compensation, as a punishment and as an example to deter others. They are penal in their character.<sup>20</sup>

§ 246. **Extraordinary Common-Law Remedies — Mandamus — Quo Warranto, Prohibition, and Habeas Corpus.** The leading extraordinary common-law remedies are those administered through:

14. Smith Elem. L. 290.

15. See "Replevin," — Cyc. —.

16. See 14 Cyc. 239.

17. See 15 Cyc. 1. Another remedy was the writ of entry. See 15 Cyc. 1057.

18. Smith Elem. L. 291; 13 Cyc.

14. And see *supra*, § 97.

19. Smith Elem. L. 291; 13 Cyc. 22

*et seq.*, 136 *et seq.*

20. Smith Elem. L. 291, 292; 13 Cyc. 105 *et seq.*

(1) The writ of mandamus; (2) the information in the nature of a quo warranto; (3) the writ of prohibition; and (4) the writ of habeas corpus.

A writ of mandamus is an order issuing from a common-law court of competent jurisdiction commanding a public officer, a corporation, or an inferior court to perform some duty which is imposed by law upon such officer, corporation, or court. This writ was used originally by the king to direct a subject to perform any desired act. But it is now issued, at the petition of a private person, to compel the performance, by an officer, corporation, or court, of some legal duty, in cases where there is no ordinary common-law remedy which is specific and adequate.<sup>21</sup>

An information in the nature of a quo warranto is an information, presented to a court of competent jurisdiction, designed to test the authority of a corporation or public officer to exercise the functions assumed by such corporation or officer. Anciently this remedy was administered through the writ of quo warranto, but this was gradually superseded by the information. The writ is, in form, a civil proceeding; the information, criminal. In effect, however, the quo warranto information is now a purely civil matter. Its object is to compel the corporation or officer to show by what authority (*quo warranto*) certain functions are exercised.<sup>22</sup>

A writ of prohibition is an order issuing from a superior to an inferior court, commanding the inferior tribunal to cease proceeding in a particular case, because that case involves matters in excess of its jurisdiction. The writ of prohibition issues to prevent a usurpation of jurisdiction by an inferior court. It prohibits such court from proceeding further in a cause already commenced, and which, because of the limited nature of its judicial powers, it has no authority to determine.<sup>23</sup>

A writ of habeas corpus is an order issuing from a common-law court requiring a person in confinement to be brought before it, in order that the legality of the confinement may be tested. This writ is the summary remedy in all cases of false imprisonment. It will issue whether the restraint be under cover of criminal or civil proceedings, or without any show of justification. It may be applied for by the person who is wrongfully detained, by some other person on his behalf, or by any one who has a right to his custody, as his parent, guardian, etc.<sup>24</sup>

§ 247. **Equitable Remedies — Injunction, Specific Performance, etc.** Those equitable remedies most frequently applied may be conveniently grouped as follows: (1) That designed to prevent

21. Smith Elem. L. 292; 26 Cyc. 125.

22. Smith Elem. L. 293; "Quo Warranto," — Cyc. —.

23. Smith Elem. L. 293; "Prohibition, Writ of," — Cyc. —.

24. Smith Elem. L. 294; 21 Cyc. 279.

the commission of wrongs; namely, the injunction; (2) those designed to regulate and enforce contract obligations; namely, (a) compelling specific performance, (b) reëxecution, (c) correction or reformation, and (d) rescission; (3) those designed to regulate and protect property rights; namely, (a) the regulation and enforcement of trusts, (b) the foreclosure of mortgages, (c) quieting title, (d) partition of joint estates, (e) appointment and control of receivers, and (f) accounting; (4) those designed to aid and enforce adjudications; namely, (a) granting writs of ne exeat, (b) discovery, (c) the perpetuation of testimony, (d) the enforcing of awards, and (e) the enforcing of judgments; and (5) interpleader.<sup>25</sup>

A writ of injunction is a writ, issuing out of a court of equity, commanding a person to do, or to refrain from doing, some act therein specified. If it commands him to do some act, it is called a "mandatory injunction." If it orders him not to do the act, it is said to be "prohibitory." Injunctions are most frequently of the latter class.<sup>26</sup>

By a "decree of specific performance" is meant a decree by a court of equity, requiring a party to a contract to fulfil his obligations under such contract, or, in other words, to specifically perform it. He is directed to do whatever he has promised to do in his agreement. Specific performance of a contract is granted only when the award of damages is not an adequate remedy for the breach.<sup>27</sup>

When a written contract or other instrument has been lost, equity will sometimes decree that it be again executed.<sup>28</sup>

When it is shown that there was mutual mistake in the framing of a written instrument, equity will decree that the instrument be revised or reformed so as to express the exact intention of the parties.<sup>29</sup>

In cases where fraud or some other reason renders it inequitable that a contract should be enforced, equity will order such contract surrendered for cancellation or rescission.<sup>30</sup>

Equity assumes control over all trust estates, compels trustees to perform their duties, and, when the interests of the *cestui que trust* render it necessary, may remove the trustee and appoint a successor to him. The origin and nature of the trust estate have already been explained. Over this estate the courts of equity have always cast their protection.<sup>31</sup>

25. Smith Elem. L. 294, 295.

26. Smith Elem. L. 295; 22 Cyc. 724.

27. Smith Elem. L. 295; "Specific Performance," — Cyc. —.

28. Smith Elem. L. 296; 25 Cyc. 1609, 1610.

29. Smith Elem. L. 296; "Reformation of Instruments," — Cyc. —.

30. Smith Elem. L. 296; 6 Cyc. 282.

31. Smith Elem. L. 296; "Trusts," — Cyc. —. And see *supra*, § 203.

By the "equitable foreclosure of a mortgage" is meant a decree of a court of equity by virtue of which the mortgagor's rights in the property are cut off, in the interest of the mortgagee. The foreclosures of mortgages in this country may assume one of two different forms, according to the view of the nature of a mortgage which prevails in the particular jurisdiction. In those States in which the mortgage is regarded as a conveyance of the title to the land, subject to the right of the mortgagor to redeem it upon payment of the mortgage debt, foreclosure is the proceeding which perfects the mortgagee's title, by cutting off the mortgagor's equity, or right to redeem. Where, however, the mortgage is regarded as a mere lien upon the property, a decree of foreclosure is an order that the premises be sold, and the proceeds applied, so far as necessary, to the payment of the mortgage debt. It is common to insert in the mortgage itself a provision that in case of default the mortgagee shall have power to sell the property in satisfaction of the claim. Where such a power of sale exists, it is not usually necessary to resort to a court of equity in order to accomplish a valid foreclosure. There are, however, statutory regulations of the foreclosure under a power of sale, designed to protect the mortgagor's interests.<sup>32</sup>

Whenever a deed or other instrument exists, which, although invalid, may yet, when the evidence necessary to overthrow it is lost, cast suspicion upon the owner's title to his property, a court of equity will, upon application by such owner, direct the instrument to be canceled. This proceeding is also referred to as "removing a cloud from the title." The remedy is applied because there is a fear that the outstanding invalid conveyance may cause the owner trouble at some time in the future, when the evidence of his title is no longer in existence.<sup>33</sup>

Concurrently, in some jurisdictions, with the courts of common law, equity has power, in most jurisdictions, to decree the partition of estates held jointly or in common. Partition is usually a matter of right. It may, of course, take place by agreement of the parties; but, in cases where they cannot agree, resort is had to the courts. If the property cannot itself be divided without greatly lessening its value, the court will order it sold and the proceeds distributed among the tenants in proportion to their shares.<sup>34</sup>

A receiver is a disinterested person appointed by a court of equity to take charge of property in litigation when it is unjust that either party to the suit should hold it. In the management

32. Smith Elem. L. 297; 27 Cyc. 916. 34. Smith Elem. L. 298; 30 Cyc. 145.

33. Smith Elem. L. 297, 298; "Quieting Title," — Cyc. —.

of the property the receiver generally acts, not as the agent of either party to the suit, but as an officer of the court.<sup>35</sup>

An account is a detailed statement of receipts and payments in connection with a particular business or trust. Equity will compel a person to render an account whenever it is necessary to protect equitable rights; and it will usually order payment of the balance thus found due. Thus, a partner, a guardian, an administrator, or any one in a position of trust, may be compelled to account to the one for whose benefit the trust is exercised.<sup>36</sup>

A writ of ne exeat is a writ issuing out of a court of equity, restraining a person from leaving the jurisdiction of the court. This writ is granted in cases where it is feared that the defendant in a case will abscond, to the irreparable injury of the plaintiff. The writ itself commands the sheriff to apprehend the defendant and keep him in custody until he gives security to abide by the decree of the court.<sup>37</sup>

Discovery is the act, on the part of the defendant, of revealing, by a statement under oath, such facts relating to the plaintiff's case as are within the defendant's knowledge. A court of equity will compel discovery whenever the facts sought are required in aid of legal proceedings. At common law, the parties to a cause were not competent to testify as witnesses in that cause. Hence, if one party wished to secure evidence of facts which were exclusively within the knowledge of the other party, he was obliged to resort in this way to equity to secure a sworn statement of them. At present this remedy is falling into disuse, because in all civil actions the parties may be compelled to testify, or because some other remedy is prescribed by statute.<sup>38</sup>

When a person's rights are not actually threatened, but he has ground to fear that they may be at some future time, when the evidence necessary to sustain them may be lost, a court of equity will decree that the testimony of witnesses shall be taken, and shall remain as a perpetual memorial for future use. In order to secure this relief, the plaintiff must show that it is impossible that his rights should be at once submitted to a judicial investigation.<sup>39</sup>

A court of equity will lend its aid to enforce awards and judgments in certain cases, when its assistance becomes necessary. Thus, when the award directs the performance of some act other than the payment of money, the common-law courts cannot usually

35. Smith Elem. L. 298; "Receivers," — Cyc. —.

36. Smith Elem. L. 298, 299; 1 Cyc. 416 *et seq.*

37. Smith Elem. L. 299; 29 Cyc. 382.

38. Smith Elem. L. 300; 14 Cyc. 301.

39. Smith Elem. L. 300; 13 Cyc. 854.

enforce such performance, and equity must be resorted to.<sup>40</sup> And if a defendant against whom judgment has been rendered has fraudulently concealed his property, or conveyed it away, equity will aid the judgment creditor in discovering it and appropriating it to his claim.<sup>41</sup>

Where a person has in his possession property to which two different parties make a claim, he may file a bill of interpleader, upon which the court of equity will decide to which of them the property belongs. The person filing the bill is a mere stakeholder, claiming no interest in the subject-matter himself. He does not feel safe in determining which of the two claimants is entitled to its possession. The two claimants are said to "interplead"; that is, they appear in favor of their respective claims, and the court determines, upon the showing which they make, their rights.<sup>42</sup>

<sup>40</sup> Smith Elem. L. 300; 3 Cyc. 790.

<sup>41</sup> Smith Elem. L. 300; 12 Cyc. 1; 20 Cyc. 672.

<sup>42</sup> Smith Elem. L. 300, 301; 23 Cyc. 1.

## CHAPTER XXI

### COURTS AND THEIR JURISDICTIONS

- § 248. Courts in General.
- 249. Courts of Record and Not of Record.
- 250. Jurisdiction.
  - a. Original and Appellate.
  - b. General and Limited.
  - c. Exclusive and Concurrent.
- 251. Courts of England before 1873.
  - a. Courts of Original Jurisdiction.
  - b. Courts of Intermediate Appeal.
  - c. Courts of Final Appeal.
- 252. Courts of England Since 1873.
- 253. Courts of the United States — Federal Courts.
- 254. Same — State Courts.

§ 248. **Courts in General.** The term "court" is used in the law in two senses: (1) To indicate that governmental agency through which the laws are interpreted and applied, consisting of one or more judges; (2) to denote the place where those judges exercise their functions. Thus, when the "jurisdiction of the court" or the "decision of the court" is spoken of, it is clear that the term "court" is used to signify the judges acting in their official capacity. But a person is sometimes referred to as "coming into court," in which case it is equally plain that the place where those judges meet to perform their duties is in mind. Using the term in the latter sense, Blackstone defines a "court" as "a place where justice is judicially administered."<sup>1</sup>

§ 249. **Courts of Record and Not of Record.** Courts are either of record or not of record. A court of record is one the acts and judicial proceedings of which are required to be enrolled or recorded for a perpetual memorial and testimony, and the formal records of which are received in other courts as conclusive evidence of the facts therein related. And a court not of record is one which is not required to keep such records, or whose records, when they are kept, are not entitled to be so received in other courts. Therefore, whether a court is or is not a court of record depends, not so much upon whether it does in fact keep a record of its proceedings, but rather upon the character of that record as evidence in other courts, for courts not of record often keep accurate minutes of their proceedings. In this country courts are created by statute, and it is customary for the statute which establishes a tribunal to state expressly whether or not it shall be a court of record.<sup>2</sup>

1. Smith Elem. L. 302; 11 Cyc. 652.

2. See 11 Cyc. 657; Smith Elem. L. 303.



§ 250. **Jurisdiction — a. Original and Appellate.** Jurisdiction is the power to hear and determine controversies, and to apply the law to them;<sup>3</sup> and jurisdiction is either original or appellate. Original jurisdiction is the power to hear and determine controversies in the first instance. Appellate jurisdiction is the power to review and correct the action of an inferior court. It is the policy both in England and in the United States to allow the defeated suitor to appeal his case to a higher court; if he feels himself aggrieved. The lower court may have been influenced by passion or prejudice, or it may have erred in its construction or application of the law. In either case, it is desirable that there be a higher tribunal, composed of judges of great learning and upright character, which may be appealed to to correct such a miscarriage of justice.<sup>4</sup>

b. **General and Limited.** Jurisdiction is also either general or limited. A court has general jurisdiction when it has power to decide all controversies which may come before it, or all except those of some particular class. A court has limited jurisdiction when it can decide controversies of a particular class only. Thus, it is common, in this country, to assign to a special court jurisdiction in matters relating to the administration and distribution of the estates of deceased persons. A court having powers only in that particular class of cases would be a court of limited or special jurisdiction. But, after all special jurisdictions are parceled out, there is always some court which has the residue of original jurisdiction. The jurisdiction of such a court is general.<sup>5</sup>

c. **Exclusive and Concurrent.** Jurisdiction is also exclusive or concurrent. Exclusive jurisdiction is that which a court possesses in controversies which cannot be heard and determined in any other court. Concurrent jurisdiction is that which a court has in controversies of such a nature that some other court might, if it had been appealed to, have heard and determined. When two courts have concurrent jurisdiction over a certain subject-matter, it is usually at the option of the party commencing suit to choose in which of the two he will institute proceedings. When, however, he has exercised his option, the court which he has chosen secures exclusive jurisdiction in that particular case.<sup>6</sup>

§ 251. **Courts of England before 1873 — a. Courts of Original Jurisdiction.** As we have already pointed out, the American lawyer or student finds in the decisions of the English courts the fountain head of the common law. It is therefore not only desirable, but necessary, in order to enable him to appreciate the value of

3. Smith Elem. L. 303; 11 Cyc. 659.

4. Smith Elem. L. 303; 11 Cyc. 658, 661.

5. Smith Elem. L. 304; 11 Cyc. 658, 660.

6. Smith Elem. L. 304; 11 Cyc. 661.

the decisions of a particular court, that he know in a general way how jurisdiction is parceled out in England. In 1873 the courts of England were remodeled; but, inasmuch as most of the great leading cases were decided before that time, the old English judicial system is of even greater interest to us than that of the present. A brief outline of both the old and the new systems will be given. The leading English courts of original jurisdiction prior to 1873 were: (1) The court of king's or (queen's) bench; (2) the court of common bench or common pleas; (3) the court of exchequer; (4) the court of chancery; (5) the court of admiralty; (6) the court of probate; and (7) the court for divorce and matrimonial causes.<sup>7</sup>

*The Court of King's (or Queen's) Bench.*—This court can be traced back to the twelfth century. It was the most important of the common-law courts, receiving its name on account of the fact that in it the sovereign was supposed to sit in person. It had jurisdiction in pleas of the crown, that is, in criminal cases, and in all suits between subject and subject, except real actions. It also had power to issue extraordinary writs, such as writs of mandamus and quo warranto.<sup>8</sup>

*The Court of Common Pleas or Common Bench.*—This court owes its origin to Magna Charta, which provided that common pleas, that is, suits between subject and subject, as distinguished from pleas of the crown, should be held at some certain place, no longer following the king. Inasmuch as the king's bench necessarily accompanied the king on his journeys throughout the kingdom, a new court—that of the common pleas—became necessary, and was established at Westminster. Its name sufficiently indicates its general jurisdiction.<sup>9</sup>

*The Court of Exchequer.*—The exchequer was the financial agency of the government. But it early began to assume judicial functions in connection with the management of the royal revenue. By a gradual enlargement of its jurisdiction, it took cognizance of all suits between subject and subject, except a few in which the court of common pleas had exclusive jurisdiction.<sup>10</sup>

*The Court of Chancery.*—The origin of this court, and its general jurisdiction, have been explained in a previous chapter.<sup>11</sup>

*The Court of Admiralty.*—The admiralty court existed as early as the fourteenth century, and had jurisdiction in matters arising wholly at sea.<sup>12</sup>

7. Smith Elem. L. 305; 3 Blackstone Comm. 23 *et seq.*

8. Smith Elem. L. 305, 306; 3 Blackstone Comm. 41.

9. Smith Elem. L. 306; 3 Blackstone Comm. 37.

10. Smith Elem. L. 306; 3 Blackstone Comm. 43.

11. See *supra*, § 35.

12. Smith Elem. L. 306; 3 Blackstone Comm. 68, 69.

*The Courts of Probate and of Divorce.*—The probate of wills and the administration of estates, as well as all matrimonial causes, were, until the middle of the present century, in charge of the ecclesiastical courts.<sup>13</sup> In 1857, however, jurisdiction in such matters was transferred to the court of probate and the court for divorce and matrimonial causes.<sup>14</sup>

**b. Courts of Intermediate Appeal.** There were, in England, three courts having an appellate jurisdiction, but whose decision was yet subject to be appealed from. These were known as the "Courts of Intermediate Appeal," and were as follows: (1) The exchequer chamber; (2) the court of appeal in chancery; and (3) the full court in matrimonial causes. The exchequer chamber was established in 1822 as a court of intermediate appeal from the three great common-law courts,—the king's bench, the common pleas, and the exchequer. In 1851 two lord justices of appeal were appointed to sit, with or without the chancellor, as a court of intermediate appeal from the court of chancery, and this was called the court of appeal in chancery. The full court in matrimonial causes had jurisdiction to review the decisions of the judge ordinary of the court for divorce and matrimonial causes.<sup>15</sup>

**c. Courts of Final Appeal.** The courts of final appeal prior to 1873 were: (1) The house of lords, and (2) the judicial committee of the privy council. From the court of probate, the court of exchequer chamber, the court of appeal in chancery, and the full court for divorce and matrimonial causes, as well as from the Scotch and Irish courts, an appeal lay to the house of lords. The judicial committee of the privy council entertained appeals from the admiralty and ecclesiastical courts, and from the colonial courts.<sup>16</sup>

§ 252. **Courts of England Since 1873.** Under the judicature acts of 1873 and 1875, all of the courts of original jurisdiction and the courts of intermediate appeal were consolidated into the supreme court of judicature, and this was subdivided into: (1) The high court of justice; and (2) the court of appeal. And the high court of justice is again subdivided into: (a) The queen's (or king's) bench division; (b) the common-pleas division; (c) the exchequer division; (d) the chancery division; and (e) the probate, divorce, and admiralty division. The court of appeal consists of five lord justices of appeal, together with the master of the rolls. From its decisions an appeal may be taken to the house of lords. The jurisdiction of the different divisions of the high court of justice corresponds in the main to that of the old

13. 3 Blackstone Comm. 64 *et seq.*

14. Smith Elem. L. 306.

15. Smith Elem. L. 307.

16. Smith Elem. L. 307, 308.

courts of the same name. Any division may, however, apply equitable rules, and, when law and equity conflict, it is provided that equity shall prevail.<sup>17</sup>

§ 253. *Courts of the United States—Federal Courts.* In the United States, both the federal government and each State has a complete system of courts. The courts of the federal government include: (1) the supreme court of the United States; (2) the circuit courts of appeals; (3) the circuit courts; (4) the district courts; (5) the court of claims; (6) the court of private land claims; (7) the United States senate; (8) the territorial courts; and (9) the courts of the District of Columbia.<sup>18</sup>

The constitution of the United States provides that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." In pursuance of this provision, congress, on September 24, 1789, passed an act, now commonly referred to as the "Judiciary Act of 1789," establishing a system of courts, which, with some modifications, still exists. The courts of the federal government have jurisdiction in "all cases in law and equity arising under the Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign states, citizens and subjects."<sup>19</sup>

*The Supreme Court of the United States.*—This court consists of nine judges, appointed by the president of the United States by and with the consent of the senate. In addition to his duties on the bench of the supreme court, each justice is assigned to one of the nine circuits, and must hold a term of the circuit court of the United States at least once in two years. The supreme court has original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party; but its principal jurisdiction is appellate. Prior to the passage of the Evarts Act of March 3, 1891, it was the general court of appeal from the inferior federal courts. Under the Evarts Act of 1891, the entire appellate jurisdiction is divided between the supreme court and the circuit courts of appeals. In addition to appeals from the court of claims, the court of private land claims, the courts of the territories and of the District of

17. Smith Elem. L. 308.

19. Smith Elem. L. 309; U. S.

18. Smith Elem. L. 309; 11 Cyc. Const. art. 3, § 2; *supra*, § 40, p. 49.  
912 et seq.

Columbia, and, in some cases where a constitutional question is involved, from the highest court of a State, appeals lie from the circuit and district courts directly to the supreme court in the following cases: (1) Where the jurisdiction of the court is in issue; (2) from the final decree in prize cases; (3) in cases of conviction of infamous crimes; (4) where the construction of the constitution of the United States is involved; and (5) where the constitutionality of any federal law, or the validity or construction of any treaty, is in question. Appeals may be taken from the circuit courts of appeal to the supreme court in all cases where the matter in controversy is more than one thousand dollars, except in admiralty, patent, revenue, and criminal cases, and those in which jurisdiction depends entirely on the citizenship of the parties.<sup>20</sup>

*The Circuit Courts of Appeals.*—These courts were established by the Evarts Act of 1891, already referred to. There are nine of them, consisting of three judges each, who may be any three of the following: The supreme court judge assigned to the particular circuit, the circuit judges for that circuit, and the district judges whose districts are therein. It has appellate jurisdiction from the circuit and district courts, and in such cases coming from the territorial courts as may be assigned to the particular circuit.<sup>21</sup>

*The Circuit and District Courts.*—The United States is divided into nine circuits, to each of which are assigned two circuit judges. The circuit court may be held by the supreme court justice assigned to the particular circuit, either of the circuit judges, the district judge of the district in which it is held, or by any two of them together. Each circuit is divided into districts. Some States constitute a single district, while others contain two or more, each district having assigned to it a district judge. The circuit and district courts have divided between them the greater part of the general original jurisdiction vested in the judicial department.<sup>22</sup>

*The Court of Claims.*—This court was established in 1855 to hear and determine claims of individuals against the federal government. It consists of five judges.<sup>23</sup>

*The Court of Private Land Claims.*—This court was established in 1891 to settle disputes concerning the title to certain lands in the western States claimed under Spanish and Mexican grants.

20. Smith Elem. L. 310; 11 Cyc. 912 *et seq.*

21. Smith Elem. L. 311; 11 Cyc. 941 *et seq.*

22. Smith Elem. L. 311; 11 Cyc. 947, 951.

23. Smith Elem. L. 311; 11 Cyc. 966 *et seq.*

By the terms of the act creating it, its existence was limited to December 31, 1895.<sup>24</sup>

*The United States Senate.*—As a court, the senate has jurisdiction to try impeachment cases only.<sup>25</sup>

*The Territorial Courts and the Courts of the District of Columbia.*—The federal government, having power to govern the District of Columbia and territories of the United States, has provided special judicial systems for them.<sup>26</sup>

§ 254. *Same — State Courts.* The systems of courts in the various States differ widely from each other, but have some general features in common. There are generally a court of final appeal, and in some States courts of intermediate appeal, courts of general original jurisdiction, courts of inferior original jurisdiction, and court of special probate jurisdiction. In most of the States the court of final appeal or of last resort is called the "supreme court" of the State, although in a number of States it is known as the "court of appeals." Provision is sometimes made, as in New York, Illinois, Indiana, Missouri, California, and some of the other States, for a court of intermediate appeal. The courts of general original jurisdiction are usually called "circuit courts," or "district courts," or "courts of common pleas." The judges of the inferior courts are known as "justices of the peace," "trial justices," or "magistrates." The court of special probate jurisdiction is usually styled the "probate court," but in Pennsylvania it is called the "orphans' court," and in New York the "surrogate's court."<sup>27</sup>

24. Smith Elem. L. 312.

25. Smith Elem. L. 312.

26. See 11 Cyc. 954 *et seq.*; 961 *et seq.*

27. Smith Elem. L. 312; 11 Cyc. 765 *et seq.*

## CHAPTER XXII

### PROCEDURE

- § 255. Procedure in General.
- 256. Essentials of Procedure.
- 257. Common-Law Procedure — Forms of Action.
- 258. Common-Law Procedure — Outline.
- 259. Equity Procedure — Outline.
- 260. Code Procedure — Outline.
- 261. Criminal Procedure — Outline.

§ 255. **Procedure in General.** The term "procedure" is used to indicate the various steps or processes in the adjudication of controversies in courts. The most common forms of procedure in vogue at present in this country are: (1) Common-law procedure; (2) equity procedure; (3) code procedure; and (4) criminal procedure.

Procedure is the method of applying the remedies of the law. There are plain reasons why various forms of procedure arose. Different methods would naturally be employed in the apprehension and punishment of a criminal from those in use in determining disputes between subject and subject. Furthermore, the court of chancery, influenced as it was by the traditions of the civil law, developed a system peculiar to itself, adapted to the application of its special remedies. And upon the introduction of the codes another system was established, which, although following in the main the equity practice, yet has borrowed freely from the other systems.<sup>1</sup>

§ 256. **Essentials of Procedure.** Whatever may be the particular form of procedure, the following essential steps appear: (1) An application to the courts; (2) the original process; (3) appearance of the opposite party; (4) pleadings; (5) a trial; (6) a decision; and (7) an enforcement of the decision. Courts do not take the initiative in a case. Until appealed to, they will not attempt to decide a controversy. Consequently, there must, in all forms of procedure, be some method of applying to the court for the redress of an alleged wrong. But, in order that justice may be done, it is also necessary that the party against whom relief is sought shall be notified, and allowed to appear and defend himself, if he so desires. This is done by the issuing and serving upon him of a notice that suit has been commenced against him. This notice is called a "writ." It is a form of what is usually known as "process." Both parties being in court, the next step is to ascertain the nature of the dispute. This is done by means of the pleadings, which are the formal statements of the cause of com-

1. Smith Elem. L. 313.

plaint, on the one hand, and the ground of defense, on the other. The parties having made their statements or pleadings, a trial is necessary to determine the rights of the parties. Each party produces his witnesses, and the judge or the jury determine the facts from their testimony. The next step is to determine the appropriate remedy, and to render a decision involving the conclusions arrived at. It then only remains necessary to enforce the decision by appropriate means.<sup>2</sup> This being the general plan of the various systems of procedure, the present chapter will be devoted to a short explanation of some of the peculiarities of the different systems.

§ 257. *Common-Law Procedure — Forms of Action.* A proceeding in a court of common law is called an "action." Actions are of three general classes: Real actions, mixed actions, and personal actions. The old forms of real actions corresponded with the following writs: (1) The writ of right; (2) the writ of entry; (3) the writ of formedon; (4) the writ of dower; (5) the writ of right of dower; and (6) the writ of quare impedit. The most common mixed action is the action of ejectment. Personal actions are either: (1) Actions *ex contractu*; or actions *ex delicto*. The principal actions *ex contractu* are those of: (a) Assumpsit; (b) debt; and (c) covenant. The principal actions *ex delicto* are those of: (a) Trespass; (b) trespass on the case; (c) trover; and (d) replevin. The action of detinue is sometimes classed as an action *ex contractu*, and sometimes as an action *ex delicto*.<sup>3</sup>

It has already been noticed, as one of the reasons for the development of the court of chancery in England,<sup>4</sup> that relief in the common-law courts could not be had unless the suitor's claim was of such a nature that the writs in common use would cover it. In other words, it must fall within one of the actions which were allowed. While the scope of these actions is much wider at present than it was at that time, by reason of the introduction of new forms of action, yet the general principle still holds true, in the common-law practice, that a case must be in the form of one of the actions above mentioned, or relief cannot be granted.<sup>5</sup>

A real action is one whose object is the specific recovery of real property. A personal action is one whose object is the specific recovery of personal property, or the recovery of damages for an injury. A mixed action is one in which both damages and the specific recovery of real property are sought.

The principal real actions formerly in use were those corresponding to the following writs: (1) The writ of right, which issued when the plaintiff sought the specific recovery of corporeal

2. Smith Elem. L. 314.

3. Smith Elem. L. 315, 316; Shipman Com. L. Pl. 2 *et seq.*

4. See *supra*, § 35.

5. Smith Elem. L. 317.



hereditaments, basing his claim upon a title to an estate in fee simple therein. (2) The writ of entry, under which the plaintiff, having been wrongfully dispossessed of lands, could recover them. (3) The writ of formedon, which was used when the plaintiff claimed the right to real property as tenant in tail, or as remainder-man or reversioner after the termination of an estate tail. The three foregoing forms of action have been abolished in England, and in most of the United States.<sup>6</sup> (4) The writ of dower, which issued in favor of a widow who claimed the specific recovery of her dower, no part of it having been assigned to her. (5) The writ of right of dower, under which the widow claimed the residue of her dower, part of it having already been assigned. (6) The writ of quare impedit, under which the plaintiff claimed that his right to a benefice was obstructed, and sought its recovery. Of the three last-mentioned writs, the writ of dower and the writ of right of dower are still used, although in most States they have given way to the mixed action of ejectment or some other remedy.<sup>7</sup> The writ of quare impedit is not in use in this country.

The action of ejectment is the leading mixed action, and into it have been merged, in most jurisdictions, all of the old real actions. It is an action for the specific recovery of land, and for damages for its detention.<sup>8</sup>

Actions *ex contractu* are those based upon contract, express or implied. Actions *ex delicto* are those based upon delict or tort. An action of assumpsit is one brought for the recovery of damages for the breach of a simple or parol contract.<sup>9</sup> An action of debt is one brought for the recovery of a liquidated or certain sum of money.<sup>10</sup> An action of covenant is one brought to recover damages for the breach of a covenant or contract under seal.<sup>11</sup> An action of trespass is one brought for the recovery of damages for a direct and forcible injury to the plaintiff's person, or corporeal property.<sup>12</sup> An action of trespass on the case lies to recover damages for an injury to person or property which is either not forcible or not direct.<sup>13</sup> An action of trover is one brought to recover damages for the wrongful conversion of personal property.<sup>14</sup> An action of replevin is one for the specific recovery of personal property, and for damages for its detention.<sup>15</sup>

6. Smith Elem. L. 316, 317.

As to the writ of entry, however, see 15 Cyc. 1057.

7. Smith Elem. L. 317; 14 Cyc. 978 *et seq.*

8. Smith Elem. L. 317; 15 Cyc. 1.

9. Smith Elem. L. 317; 4 Cyc. 317.

10. Smith Elem. L. 317; 13 Cyc. 402.

11. Smith Elem. L. 317; 11 Cyc. 1022.

12. Smith Elem. L. 317; "Trespass," — Cyc. —. See *supra*, § 118.

13. Smith Elem. L. 317; 6 Cyc. 681. This is the usual form of action for negligence, nuisance, etc.

14. Smith Elem. L. 317; "Trover and Conversion," — Cyc. —. See *supra*, §§ 31, 119.

15. Smith Elem. L. 317; "Replevin," — Cyc. —.

§ 258. **Common-Law Procedure Outline.** Under the common-law system of procedure: (1) Suit is commenced by the filing of a *præcipe* and the issuing of an original writ. (2) The defendant appears either in person or by attorney. (3) The pleadings are in the following order: (a) The plaintiff's declaration; (b) the defendant's plea, or, when he wishes to raise a question of law, his demurrer; (c) the plaintiff's replication to the plea; (d) the defendant's rejoinder; (e) the plaintiff's surrejoinder; (f) the defendant's rebutter; and (g) the plaintiff's surrebutter. (4) The trial is usually by jury. (5) The decision of the jury is called a "verdict," upon which the court renders a judgment. (6) The judgment is enforced by means of an execution.<sup>16</sup>

*The Præcipe and Original Writ.*—The *præcipe* is merely a request that an original writ issue. It was in England filed in the court of chancery, from which the writ issued. The writ itself was an order, under the great seal and the king's name, directed to the sheriff of the county where the injury was supposed to have been committed, instructing him to command the defendant to satisfy the plaintiff's claim, or to appear in one of the superior common-law courts to defend the action.<sup>17</sup>

*The Pleadings.*—The defendant having appeared in response to the writ, the pleadings commence. Originally these were oral altercations in open court. The judge sat as moderator of the proceedings, and caused the parties, as rapidly as possible, to come to an issue; that is, to reduce their dispute to some single, material point, affirmed on one side and denied on the other. The object of pleading at the common law was the production of a single issue. At present the pleadings in all principal courts are in writing. The plaintiff first files his declaration. A "declaration" is defined to be a formal statement of the facts constituting the plaintiff's cause of action. The defendant may then pursue one of two courses: He may deny the facts stated in the declaration, or he may claim that, even if those facts are true, still they do not show a right to recover. The former course involves the filing of a plea; the latter, of a demurrer. The former tends to raise an issue of fact; the latter, an issue of law. If a demurrer is filed, the plaintiff's next step is to join in the demurrer, and the issue of law is complete. If a plea is filed, it may either be a plea of traverse, which merely denies the facts in the declaration, or a plea of confession and avoidance, which admits the facts in the declaration to be true, but sets up new facts which alter their legal effect. To the new matter thus set up, the plaintiff, in his replication, may traverse, or confess and avoid, as may either of the parties in any of the subsequent pleadings. But, upon a traverse, issue must be

16. Smith Elem. L. 318.

17. Smith Elem. L. 318.

tendered; and this issue, when well tendered, must be accepted. Consequently, whenever either party, at any stage of the proceedings, traverses, there must follow a joinder in issue, and the pleadings are at an end.<sup>18</sup>

*The Trial.*—A discussion of the trial will be deferred until the next chapter.

*Verdict and Judgment.*—The jury are the judges of the facts in the case, while the judge determines the law applicable to these facts. In practice, the court instructs the jury in the law which bears upon the case, and under such instructions the jury determines which party shall prevail. Their decision is called a "verdict." If the verdict is for the plaintiff, the jury also report the amount of damages to which he is entitled.<sup>19</sup> The judgment is, as its name implies, a statement of the conclusion at which the judge and jury have jointly arrived. It is a determination of the rights of the parties, but it does not command any affirmative action on the part of either party. It decides, but for the enforcement of the decision an execution is necessary.<sup>20</sup>

*Execution.*—Upon a judgment in his favor, the plaintiff, after waiting a reasonable time, within which to allow the defendant to appeal, if he so desires, is entitled to a writ of execution. This is a writ directed to the sheriff, or some other executive officer who is by law qualified for such purpose, usually commanding him to levy upon and sell enough of the property of the defendant to satisfy the judgment.<sup>21</sup>

§ 259. *Equity Procedure — Outline.* Under the equity system of procedure: (1) Suit is commenced by the filing of a bill of complaint. (2) The writ by means of which the defendant is summoned into court is called a "subpoena"; (3) the defendant may appear either in person or by attorney; (4) the pleadings are in the following order: (a) The bill of complaint; (b) the defendant's answer, plea, disclaimer, or demurrer; and (c) the plaintiff's replication. (5) The hearing or trial is usually without a jury. (6) The decision of the court is embodied in its decree. (7) The decree is enforced by punishing the party who fails to obey it.<sup>22</sup>

*The Bill of Complaint.*—The bill, in equity, serves the twofold office of an appeal to the court, and the first of the plaintiff's (or complainant's) pleadings. In form, the bill calls the attention of the court to the facts upon which the claim for relief is based,

18. Smith Elem. L. 319; 31 Cyc. 1; Shipman Com. L. Pl. 199 *et seq.*

19. Smith Elem. L. 320; "Trial," — Cyc. —.

20. Smith Elem. L. 320; 23 Cyc. 623.

21. Smith Elem. L. 320; 17 Cyc. 878.

22. Smith Elem. L. 320, 321; 16 Cyc. 209 *et seq.*

and prays the court to issue a subpoena to the defendant (or respondent), and, upon hearing, to grant the relief sought.<sup>23</sup>

*Subpœna and Appearance.*—The “subpœna” is a writ directed to the defendant, requiring him to appear at a certain time, upon penalty of having the bill taken as confessed against him. His appearance may be in person or by attorney.<sup>24</sup>

*The Subsequent Pleadings.*—There is much less formality in the pleadings in equity than is required in those at common law. There is only one form of action. When the defendant appears in response to the subpoena, he has his choice of four courses. If he claims no interest whatever in the subject-matter of the bill, he files a disclaimer. If he regards the bill as insufficient in point of law, he demurs. If he sees some single, material fact, upon the truth or falsity of which he is willing to base his defense, he files a plea, which in equity is quite different from the plea at common law. If he wishes to make a more general denial, he embodies his defense in an answer. To the plea or answer the plaintiff files a replication, and the case is at issue.<sup>25</sup>

*Hearing.*—In equity there is no trial by jury as in actions at common law, but the chancellor hears or tries the case and decides both the facts and the law. This is called a “hearing.”<sup>26</sup> The chancellor may, however, if he sees fit, submit questions of fact to a jury.<sup>27</sup>

*The Decree and its Enforcement.*—The decree in equity differs materially from a judgment at law. While a judgment is a mere statement of the rights of the parties, a decree often goes further, and directs specifically what each party is to do in order to accomplish justice; and if any party refuses to obey the orders of the decree, he is guilty of contempt of court and is punished accordingly.<sup>28</sup>

§ 260. *Code Procedure—Outline.* Under most of the Codes: (1) Suit is commenced by the filing of a complaint or petition. (2) The writ by which the defendant is notified is usually called a “summons.” (3) The defendant may appear either in person or by attorney. (4) The only pleadings usually allowed are: (a) The complaint or petition; (b) the answer or demurrer of the defendant; (c) the reply or demurrer to the answer; (d) the demurrer to the reply. (5) The trial may be with or without jury. (6) The court’s decision may take the form of a judgment or a decree, according to whether the action is of a legal or equitable nature. (7) If the action is legal in its nature, the judgment is enforced

23. Smith Elem. L. 321; 16 Cyc. 216 *et seq.*

24. Smith Elem. L. 321; 16 Cyc. 209 *et seq.*

25. Smith Elem. L. 321, 322; 16 Cyc. 258 *et seq.*

26. See 16 Cyc. 407 *et seq.*

27. See 16 Cyc. 413 *et seq.*

28. Smith Elem. L. 320; 16 Cyc. 471 *et seq.*, 499.

by execution; if equitable, by contempt of court proceedings. Under the codes, it is usually provided that distinctions between actions at law and suits in equity shall no longer be recognized, and that there shall be but one form of action, known as "civil action." The procedure itself corresponds in most respects to that in equity, except that when the case is in its nature legal, as distinguished from equitable, judgment is rendered and execution issued thereon as under the common-law system.<sup>29</sup>

§ 261. **Criminal Procedure—Outline.** The common steps in a criminal trial are as follows: (1) Arrest of the defendant, with or without warrant; (2) commitment or bail; (3) accusation; (4) arraignment; (5) plea or demurrer and issue; (6) trial and verdict; (7) sentence; and (8) execution.<sup>30</sup>

*Arrest.*—Arrest is the apprehension of the person of the defendant in order to secure his presence at the trial, and may be made, according to the circumstances, with or without a warrant. A warrant is a writ issued to an officer, or, it may be, to a private person, commanding him to arrest the defendant and bring him before the proper officer or court to answer for his crime. An arrest may be made by an officer or private person without a warrant when a crime is committed in his presence by the defendant, or when he has probable cause for believing that the defendant has committed a felony.<sup>31</sup>

*Commitment and Bail.*—Commitment is the act of sending the defendant to some lawful place of imprisonment, to remain until he is released or removed by further order of the court. Bail is a substitute for commitment, by means of which the defendant is delivered or bailed into the hands of certain persons, who have signed a bond or recognizance conditioned upon his appearance at the trial.<sup>32</sup>

*Accusation.*—This may be regarded as in the nature of a pleading on the part of the government, in which the prisoner is accused of the offense for which he has been arrested. If it is presented by a grand jury upon the suggestion of the public prosecutor, it is called an "indictment." If it is formulated and presented by the grand jury upon their own motion, it is known as a "presentment." If it is presented by the public prosecutor without the intervention of a grand jury, it is an "information."<sup>33</sup>

*Arraignment and Plea or Demurrer.*—As a preliminary to the trial, the prisoner is arraigned—that is, he is called to the bar of the court, where the indictment, information, or presentment is

29. Smith Elem. L. 322, 323.

30. Smith Elem. L. 323; Clark Cr. Proc. 19 *et seq.* And see 12 Cyc. 70.

31. Smith Elem. L. 324; 3 Cyc. 867.

32. Smith Elem. L. 324; 5 Cyc. 1;

12 Cyc. 312.

33. Smith Elem. L. 324; 22 Cyc. 157 *et seq.*

read to him, and he is asked to say whether he is guilty or not guilty.<sup>34</sup> The prisoner may then respond, if he chooses to do so. If he pleads guilty, a trial becomes unnecessary. If he declines to plead, a plea of not guilty is entered.<sup>35</sup> If the indictment is insufficient as a matter of law on the face of it he may demur.<sup>36</sup>

*Trial.*—The right of a person accused of crime to a trial by jury is guaranteed by the constitution of the United States. The trial closes with the verdict of the jury.<sup>37</sup>

*Sentence.*—If the accused is found guilty upon the trial, sentence is pronounced upon him by the court. This is analogous to a judgment at common law, except that it specifies the amount and kind of punishment to which the prisoner shall be subjected.<sup>38</sup>

*Execution.*—The execution in a criminal case is the application, by the proper officer, of the punishment directed by the court in its sentence.<sup>39</sup>

34. Smith Elem. L. 324; 12 Cyc. 344.

35. Smith Elem. L. 325; 12 Cyc. 344 *et seq.*

36. See 22 Cyc. 427.

37. Smith Elem. L. 325; 12 Cyc. 504 *et seq.*

38. Smith Elem. L. 325; 12 Cyc. 769 *et seq.*

39. Smith Elem. L. 325; 12 Cyc. 789.

## CHAPTER XXIII

### TRIALS

- § 262. Particular Forms of Trial.
- 263. Trial Procedure — Outline.
- 264. Evidence.

§ 262. **Particular Forms of Trial.** A trial is the means employed by the courts to determine the issue or issues developed by the pleadings in a case. Various crude forms of trial were in use in England at an early day. Among them may be mentioned: (1) Trial by compurgation; (2) trial by ordeal; and (3) trial by battle. These three forms of trial were of Saxon origin. The first two were applied chiefly to criminal cases. If a person accused of crime would swear that he was innocent, and could get a certain number of reputable men from his neighborhood to swear that they believed him, he was acquitted. If he could not clear himself by this method of compurgation, he was obliged to submit to the ordeal. This consisted in plunging the arm up to the elbow in boiling water, or in carrying a piece of red hot iron a certain distance. It was believed that, if the accused was innocent, God would hold him harmless. In the trial by battle the two parties to the cause engaged in combat in presence of the judges, heaven being appealed to to give the victory to him who was in the right. Trial by battle was not abolished in England until 1819.<sup>1</sup> Descriptions of this form of trial are given in Sir Walter Scott's "Ivanhoe" and "Talisman."

These early forms of trial have been entirely superseded by the trial by jury, and the trial by the court itself, without jury.

In England, about the time of the granting of Magna Charta, it became customary to select twelve men, who were acquainted with the facts in the case, to decide the issue. This was the earliest form of the jury. Gradually, however, that body came to assume its modern position. At present the jury is composed of persons who are unacquainted with the facts, but are informed in regard to them by the testimony introduced in their presence. They decide, not from what they know of the case, but from the evidence furnished by those who are acquainted with the facts. Trial by jury is the common method of trial in actions at common law, criminal actions, and in those proceedings under the code which are in the nature of common-law actions. In equity, and in equitable proceedings under the code, the trials are usually by the

1. Smith Elem. L. 326.

court alone.<sup>2</sup> The function of the jury is to determine the facts of the case. The decision of points of law is by the judge. In a trial without jury, the judge decides both the law and the facts.<sup>3</sup>

§ 263. **Trial Procedure—Outline.** The ordinary steps in a jury trial are as follows: (1) Impaneling the jury; (2) opening the case; (3) production of testimony; (4) argument; (5) charge or instructions to the jury; (6) verdict and judgment. In a trial without jury, the process is the same, except, of course, that no jury is impaneled, there is no charge to the jury, and no verdict separate from the judgment.<sup>4</sup>

*Impaneling the Jury.*—It is essential to a successful trial that the jury be impartial. There is usually prepared for each term of court a list of qualified persons, from whom the jurors are to be selected. At the opening of the trial, twelve men from this list are called to the jury box, and, unless objection is made to them, or any one of them, they act as jurors in the particular case. But the law gives to each party the right to object to a certain person's sitting as a juror in his case, and, if proper reasons for the objection are given, the person so objected to will be supplanted by another from the jury list. Such an objection is called a "challenge for cause." In addition to the right to challenge for cause, it is usually provided that each party shall be allowed to challenge a specified number of jurors peremptorily, without assigning cause. In civil cases, each party is allowed by statute from two to five peremptory challenges, while in criminal cases a much larger number is allowed. After the jury have been selected, they are sworn to well and truly try the matter in dispute, and a true verdict render upon the evidence presented in the case.<sup>5</sup>

*Opening the Case.*—As an introduction to the testimony proposed to be offered, it is customary, although not essential, for each party to give an outline of what he proposes to prove. This makes it possible for the jury to appreciate what bearing the testimony has upon the case, when it is presented.<sup>6</sup>

*Production of the Testimony.*—Where testimony exists in the form of documents, the papers themselves are introduced. Frequently also articles of various sorts are introduced into evidence. Such articles or papers, upon being presented, are marked "Exhibit A," "Exhibit B," etc., or by some other identifying mark, and are known by such mark throughout the trial. The jury, in such instances, inform themselves of the facts by actual

2. Smith Elem. L. 226, 227; 24 Cyc. 82 *et seq.*

3. Smith Elem. L. 327. And see 12 Cyc. 587 *et seq.*; "Trial," — Cyc. —.

4. Smith Elem. L. 327, 328; 12 Cyc. 543 *et seq.*; "Trial," — Cyc. —.

5. Smith Elem. L. 328; 24 Cyc. 208 *et seq.*

6. Smith Elem. L. 328.



inspection. They are also sometimes taken to inspect the premises where a particular act is alleged to have been committed. But the most common sources of evidence are the witnesses in the case. They are summoned to appear by means of a writ of subpoena. After being sworn to testify to the truth, the whole truth, and nothing but the truth, they are questioned with regard to what they know of the matter in dispute. The party producing a witness, or his attorney, first examines him, bringing out the testimony desired. This is called the "direct examination." The opposite party may then cross-examine the witness, asking him questions pertaining to the matter brought out on the direct examination. There is then usually a redirect examination, and sometimes a re-cross-examination is allowed.<sup>7</sup>

*Argument.*—After the testimony on both sides has been produced, each party may, in person or by his attorney, address the jury and the court in support of his claims. Usually the plaintiff makes the first address, and is followed by the defendant, after which the plaintiff has the right to close the argument.<sup>8</sup>

*Judge's Charge — The Verdict — The Judgment.*—The arguments having closed, the judge instructs the jury on the law of the case, the jury retire, and after deliberation return a verdict, and upon this verdict judgment is rendered by the court. The nature of the verdict and judgment has already been explained.<sup>9</sup>

§ 264. *Evidence.* Evidence is the means by which an allegation is shown to be true or false. There are certain matters which it is unnecessary to prove, because they are of such a nature that the court will take notice of them whenever they are material to the controversy. Such matters are said to be "judicially noticed." For example, it will not be necessary to furnish evidence of the ordinary course of nature, the political organization of our government, and the existence and title of other nations, the jurisdiction of superior courts in the State, the public laws of the State and of the United States, etc.<sup>10</sup> Four cardinal rules govern in the production of evidence in court. They are as follows: (1) The evidence must correspond to the allegation, and be confined to the point in issue. (2) It is sufficient if the substance only of the issue be proved. (3) The burden of proof is on the party holding the affirmative. (4) The best evidence of which the case is susceptible must be produced. There are also many rules which govern the admissibility of evidence and the competency of witnesses, but which we cannot go into now.<sup>11</sup>

7. Smith Elem. L. 329.

8. Smith Elem. L. 329; "Trial," — Cyc. —.

9. Smith Elem. L. 329; *supra*, § 258.

10. Smith Elem. L. 330.

11. See 12 Cyc. 390 *et seq.*; 10 Cyc. 821 *et seq.*; 17 Cyc. 1 *et seq.*; "Witnesses," — Cyc. —.

**PART IV**  
**LEGAL ETHICS**

[331]



## LEGAL ETHICS

The dignity and importance of the profession of law can hardly be overestimated. As has been said by one of our leading jurists: "While it is cheap wit for many to say sneering things of our profession, yet, if you strike from Anglo-Saxon history the thoughts and deeds of lawyers, you rob it of more than half its glory. Blot from American society to-day the lawyer, and all the work that he does, and all the power that he exerts, and you leave society as dry and shifting as the sands that sweep over Sahara. For the mystic force that binds our civilization together and makes possible its success and glories, is the Law, and they who minister at its shrine and keep alive its sacred fires, are you and I, and that vast multitude of co-workers who boast of no higher title than that of lawyer."<sup>1</sup>

"Ethics" generally has been defined as "the science of right conduct and character; the science which treats of the nature and grounds of moral obligation and of the rules which ought to determine conduct in accordance with this obligation; the doctrine of man's duty in respect to himself and the rights of others."<sup>2</sup> And applying this definition to the profession of Law, "legal ethics," or, as it is sometimes called, "professional ethics," as usually understood, may be defined as "that body of moral rules peculiar to the legal profession and regulating professional conduct in all its bearings."<sup>3</sup> As an officer of the courts of justice, the lawyer owes high duties to the state and to the public, to the court itself, to his professional brethren, and last, but not least, to his client. These duties have been often defined by legal writers — not always with the same results. One of the best known statements of the duties which rest upon the lawyer is found in a little book which appeared in the year 1854, from the pen of George Sharswood, then a *nisi prius* judge of Philadelphia, and, later, a justice of the supreme court of Pennsylvania. This book, commonly known as "Sharswood's Legal Ethics," is a work that every lawyer should read and study. It should be supplemented by a study of the Code of Legal Ethics, which has

1. Mr. Justice Brewer, of the Supreme Court of the United States, quoted in the dedication of Alderson on Judicial Writs and Process.

2. Century Dict. "Ethics."

3. Kinkead Jur. L. & Ethics 161.

recently been adopted, after very careful consideration, by the American Bar Association. A copy of this Code, with references to Cyc., follows:

### CODE OF ETHICS

Adopted by American Bar Association

**1. The Duty of the Lawyer to the Courts.** It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.<sup>4</sup>

**2. The Selection of Judges.** It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political, or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.<sup>5</sup>

**3. Attempts to Exert Personal Influence on the Court.** Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstruction of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty,

<sup>4</sup> Attacking or criticizing Court as ground for disbarment see 4 Cyc. 908.

Attacking or criticizing Court as constituting contempt see 9 Cyc. 18-20.

Suspension or removal of judge and liability of judge for official acts see 23 Cyc. 522, 567.

Remarks and conduct of judge on trial or case in general see 12 Cyc. 538; "Trial." — Cyc. —.

<sup>5</sup> Appointment, eligibility, and qualification of judges see 23 Cyc. 508, 510.

without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

**4. When Counsel for an Indigent Prisoner.** A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

**5. The Defense or Prosecution of Those Accused of Crime.** It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

**6. Adverse Influences and Conflicting Interests.** It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.<sup>6</sup>

**7. Professional Colleagues and Conflicts of Opinion.** A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

<sup>6</sup> Acting for adverse parties in different capacities or receiving compensation from adverse party see 4 Cyc. 957 *et seq.*

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to coöperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another lawyer are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.<sup>7</sup>

**8. Advising Upon the Merits of a Client's Cause.** A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.<sup>8</sup>

**9. Negotiations With Opposite Party.** A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

**10. Acquiring Interest in Litigation.** The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting.

**11. Dealing With Trust Property.** Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him.<sup>9</sup>

7. Change and substitution of attorneys see 4 Cyc. 954.

8. Negligence of attorney in advising client see 4 Cyc. 964.

9. Authority of attorney as to dis-

position of client's money or other property see 4 Cyc. 944.

Accounting and payment to client see 4 Cyc. 963.

**12. Fixing the Amount of the Fee.** In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee it is proper to consider: (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.<sup>10</sup>

**13. Contingent Fees.** Contingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges.<sup>11</sup>

**14. Suing a Client for a Fee.** Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be restored to only to prevent injustice, imposition, or fraud.<sup>12</sup>

**15. How Far a Lawyer May Go in Supporting a Client's Cause.** Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs

10. Right of attorney to compensation, contracts therefor and value and amount thereof see 4 Cyc. 979.

11. Validity and effect of agreement for contingent fee see 4 Cyc. 989.

Agreement for contingent fee as constituting champerty see 6 Cyc. 858.

12. Right of action for fees, defenses, and practice see 4 Cyc. 997.



to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.<sup>13</sup>

**16. Restraining Clients from Improperities.** A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses, and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.<sup>14</sup>

**17. Ill Feeling and Personalities Between Advocates.** Clients, not lawyers, are the litigants. Whatever may be the ill feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

**18. Treatment of Witnesses and Litigants.** A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in

13. Nature of office of attorney and duty to follow client's instructions see 4 Cyc. 932, 956.

14. Termination of relation by withdrawal of attorney see 4 Cyc. 954.

professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

**19. Appearance of Lawyer as Witness for His Client.** When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.<sup>15</sup>

**20. Newspaper Discussion of Pending Litigation.** Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.<sup>16</sup>

**21. Punctuality and Expedition.** It is the duty of the lawyer not only to his client, but also to the Courts and to the public, to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

**22. Candor and Fairness.** The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

15. Competency of attorneys as witnesses see "Witnesses," — Cyc. —.

16. Publications relating to pending proceedings as constituting contempt see 9 Cyc. 20.

A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.<sup>17</sup>

**23. Attitude Toward Jury.** All attempts to curry favor with juries by fawning, flattery, or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about a case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.<sup>18</sup>

**24. Right of Lawyer to Control the Incidents of the Trial.** As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.<sup>19</sup>

**25. Taking Technical Advantage of Opposite Counsel — Agreements With Him.** A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible important agreements affecting the rights of clients should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

17. Regulation of professional conduct of attorneys and conduct ground for disbarment see 4 Cyc. 905.

Conduct constituting contempt see 9 Cyc. 7.

18. Argument and conduct of counsel in general see 12 Cyc. 568; "Trial," — Cyc. —.

Argument and conduct ground for new trial see 12 Cyc. 707, 708; 29 Cyc. 774.

19. Authority of attorney as to conduct of litigation see 4 Cyc. 934.

Duty of attorney to follow instructions of client see 4 Cyc. 968.

**26. Professional Advocacy Other Than Before Courts.** A lawyer openly and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.<sup>20</sup>

**27. Advertising, Direct or Indirect.** The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

**28. Stirring up Litigation, Directly or Through Agents.** It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship, or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court, or prison officials, physicians, hos-

20. Validity of lobbying contracts see 9 Cyc. 486.

pital attachés or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

**29. Upholding the Honor of the Profession.** Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

**30. Justifiable and Unjustifiable Litigations.** The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

**31. Responsibility for Litigation.** No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

**32. The Lawyer's Duty in Its Last Analysis.** No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or

persons, exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.<sup>21</sup>

21. Duties, privileges, disabilities, and liabilities of attorneys in general see 4 Cyc. 889 *et seq.*

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**PART V**  
**ILLUSTRATIVE CASES**

[345]





CUNNINGHAM v. DORSEY,

SUPREME COURT OF APPEALS OF WEST VIRGINIA, 1869

[3 W. Va. 293]

1. The common law of England, so far as it is not repugnant to the principles of the bill of rights and constitution of the State of Virginia, was in force in that State when the constitution of this State took effect, and is, therefore, the law of the State unless repealed or modified by the general assembly of Virginia or of the legislature of this State.

2. Adverse enjoyment of lights for a time which must have exceeded thirty years, does not give sufficient right to the party enjoying them to enable him to maintain an action for obstructing them.

3. D. owned and occupied property in which windows had been constructed since 1803. C. owned adjoining property which had been in occupancy of the owners from 1803 to 1826 inclusive, and had been in actual occupancy of tenants paying annual rental value from that time till the bringing of the suit in 1866. D. sought to enjoin the tenants of C. from erecting buildings on his lot that would darken his windows and impair the enjoyment of his property. *Held:*

1. That the time from 1803 to 1826, when the property of C. had been in possession and actual occupancy of the owners thereof, was not sufficient to make the windows of D. ancient lights.

2. The time from 1826 to the bringing of the suit cannot be computed in the period necessary to make the windows ancient, as the property of C. was not in the actual occupancy of the owners thereof, but in the possession and actual occupancy of the tenants. The enjoyment of the windows by D. was not a matter for which C., or those from whom he derived title, could bring an action for damages, and the only remedy was to obstruct them, which they could not do without committing a trespass on the rights of the tenants, which they were not required to do.

This cause was brought to April rules, 1866. The complainant below, William Dorsey, filed a bill in the circuit court of Berkeley county, alleging his ownership in fee of a certain lot in Martinsburg, on which was erected a building fronting on Burke street with wing extending to the rear. That for fifty years he and those under whom he held had, without interruption, enjoyed the light and air derived from windows on the west side of the rear building; that one Patrick Cunningham was the owner of the lot adjoining on the west side, and had leased it to J. W. and C. M. Slyer for a period of five years, who proposed to erect a building that would deprive complainant of the use and benefit of the windows on the west side of his building. He asked that the parties named be restrained and enjoined from so interrupting his use and enjoyment of his ancient lights. The defendant Cun-

ningham demurred to the bill, and answered that the building proposed to be erected would not be over fourteen feet high and would be five feet from the complainant's house; that the lot owned by him was in the business part of the town and if he was not permitted to build on it that it would be greatly impaired in value; that since he had been the owner of the lot it had been in the occupancy of tenants who had paid an annual rental value for the use thereof; that according to his information the former owners of the lot in fee simple, had not, within the memory of man, been in actual possession of it, but it had been in possession and occupancy of tenants who paid a rental value for the same. He denied that the consent of owners had ever been given, which was claimed by an amended bill, to the use of the windows by the defendant.

The defendants Slyer answered that they had leased the lot and property of Cunningham for five years, and regarded themselves at liberty, under the lease, to erect any buildings they might think proper.

Several depositions were taken in the cause, from which it appears that the house and lot owned by Dorsey had been in the actual possession and occupancy of Dorsey and those under whom he claimed from 1803 to the bringing of the suit. That the property claimed by Cunningham had been in the actual occupancy of the owners thereof from 1803 to 1826, and that from that time to the bringing of the suit it had been in the possession and occupancy of tenants, who paid an annual rental value therefor. This is all the testimony that it is necessary to show here, as it is all that bears on the point that was determined by this court.

The court below overruled the defendant's demurrer and perpetuated the injunction, whereupon they appealed to this court.

*Stanton & Allison* for the appellants.

This case raises the question, Is the English doctrine as to ancient lights the law of West Virginia?

We claim that a prescriptive right to light and air is not suited to the condition of this State or any other country which is growing and changing so rapidly in all its relations of property as well as its values and modes of enjoyment. See Wash. on Easms. (2d ed.) 582-589; 2 Wash. on Real Prop. (3d ed., 1868) 318.

Such is the declared opinion of the legislature of West Virginia. See new code of 1869.

The English doctrine has been repudiated and declared not to be the common law in the United States by the highest courts

of the following States, which include nearly all of those wherein the question has been decided. *Pierre v. Ferwood*, 26 Maine Rep. 436; *Hubbard v. Town*, 33 Vermont Rep. 295; *Carney v. Dee*, 14 Gray 583; *Paine v. Boston*, 4 Allen 169; *Ingraham v. Hutchinson*, 2 Conn. Rep. 584; *Parker v. Foote*, 19 Wend. 309, 10 Barb. 537, 4 Coms. 195, 200; *Havership v. Sipe*, 33 Penn. St. 368, 371; *Cheney v. Stine*, 11 Md. 124, overruling 5 Har. & J. 477; *Ward v. Neal*, 37 Ala. 501, overruling a former contrary decision; *Napier v. Bedwinkle*, 5 Rich. 311-324, overruling *McCready v. Thompson*, Dudley 131; *Morrison v. Margatt*, 7 Am. Law Reg. 336, April 1868.

But if the English doctrine is to be enforced in this State, the complainant was not entitled to the relief granted upon the record in this case.

1st. The complainant had an adequate remedy at law by an action on the case for damages and therefore the chancellor should not have interposed. His right was disputed, and, to say the least, was not clear. Wash. Easm. 668, p. 1, 780, p. 4.

2d. There was no acquiescence on the part of Cunningham and those under whom he claims. None is alleged in the bill.

"*User and acquiescence are both necessary.* User alone, although twenty years and unmolested, if it be not sanctioned by the acquiescence of the party against whom the easement is claimed, is insufficient to raise the presumption of a license or grant." Matthews' Pres. Ev. 320, margin, p. 305-6. See also his article "As to Lights," pp. 318, 322; 3 Kent, 448, last edition, 573.

Dorsey's bill simply alleges *user without interruption*. This is simply equivalent to an allegation of "*user unmolested*" with language of the above authority and is insufficient and demurrable, unless it is also alleged that it was acquiesced in by the adjoining owner. See next quotation.

There is no allegation even that the user was with the knowledge of the adjoining owner.

"Nor can the presumption be made if the party who is alleged to have authorized the use of the easement, possessed only a particular interest in the estate prejudiced by it." Matthews, 321.

In order to acquire an easement of light over a parcel of land by adverse enjoyment, the same must have been had while the servient estate was in possession of the owner of the inheritance. No length of enjoyment as against a tenant can bind the rights of a reversioner. *Baker v. Richardson*, 4 Barn. & Ald. 578; *Daniel v. North*, 11 East. 372; Wash. Easm. 579 (margin 493-4); *Holland v. Long*, 7 Gray 486; 3 Kent 448.

In the case before the court the owner was not in the occupancy

a sufficient time to secure to Dorsey an easement under the English rule. It is claimed that he was by Dorsey, but this should be clearly proved. If there is a reasonable or fair doubt upon this point the complainant should have been required to first resort to his remedy at law, where the question of fact would have been tried by a jury. The proof does not establish that Dorsey would sustain real injury.

"To enable the party to maintain an action for the injury there must be a substantial privation of light sufficient to render the occupancy of the house uncomfortable, and to prevent the owner from carrying on his accustomed business on the premises as beneficially as he had formerly done, and it is for the jury to discriminate between practical inconvenience and a real injury to the enjoyment of the premises." Wash. Easement, 582, margin 4971, and authorities there cited.

"The common law of England is at this day the law of this commonwealth, except so far as it has been altered by statute or so far as its principles are inapplicable to the state of the country, or have been abrogated by the revolution and the establishment of free institutions. It adapts itself to the situation of the society, being liberalized by the courts according to the circumstances of the country and the manners and genius of the people, so as to effect a reasonable and substantial rather than literal compliance with its principles." 1 Tucker's Commentaries 9; 1 Wash. 83; 1 H. & M. 162; 4 H. & M. 19; 6 Munf. 148; 3 Leigh 339.

In pleading a right arising from long and uninterrupted enjoyment, the party who relies upon it must allege a grant of the right, though in point of fact no such grant was ever made. And there must be an adverse user under a claim of right or the presumption will not arise. 1 Tucker Com. book 2, p. 6; Wash. Easements, 124; 4 Rand. 66.

Daniel Marker testifies that he owned the Dorsey house twenty-five years ago, and was the owner from three to five years, and he made no claim of a right to light or air through those west windows. That he sold to Jacob Myers, who he thinks made no such claim. Myers sold to Dorsey.

If the owner of the servient estate die, and the heir be under disability the effect of the prescription is arrested and suspended during the disability. 2 Wash. Easements, 305, margin, 501.

*Charles J. Faulkner* for the appellee.

1. The common law of England, whilst adopted in all the States as the basis of its jurisprudence, has not been regarded with equal favor in them all. In some, many of its well established princi-

ples have been capriciously changed by legislation. In others, its doctrines have been disregarded upon the fanciful idea that they were not suited to the condition of the country and the progressive spirit of the age. But in Virginia, as a system, its principles have been held in veneration and respect, and except where found repugnant to our form of government and altered by legislative authority, its doctrines have been uniformly followed as the guide of judicial decisions. It has been consequently declared that:

"The common law of England, so far as it is not repugnant to the principles of the bill of rights and the constitution of this State, shall continue in full force within the commonwealth, and be the rule of decision, except in those respects wherein it is, or shall be altered by the general assembly." Ord. of Convention, May, 1776; Hen. Stat. at Large, p. 127; 13 Ib. p. 23; 1 Rev. Code, p. 135-6, chap. 38-40.

2. The State of West Virginia adopting the same views, embraced the following provision in the constitution of our State: "Such parts of the common law and of the laws of Virginia as are in force within the boundaries of West Virginia when the constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State, until altered and repealed by the legislature." Art. 11, § 3.

3. The evidence of what the common law is, is to be found in the decisions of the courts of justice and the treatises of learned jurists. The reports of judicial decisions contain the most certain evidence of the common law, and all properly constituted courts consider it their duty to adhere to the authority of adjudged cases. 1 Kent 476. "It is my wish and my comfort," said the distinguished Lord Kenyon, "to stand *super antiquas vias*. I cannot legislate, but by my industry I can discover what my predecessors have done, and will tread in their footsteps."

As the common law of England was and is, says Chief Justice Marshall, the common law of this State, and as an appeal from the courts of Virginia lay to a tribunal in England, which would be governed by the decisions of the courts, the decision of those courts, made before the revolution have all that claim to authority, which is allowed to appellate courts. *Murdock v. Hunter*, Rep. 1; Brock. Rep. p. 140-1.

4. The doctrine of acquiring a legal title by long and quiet enjoyment was very early adopted as a part of the common law, the maxim of which has been *ex diuturnitate temporis omnia presumuntur solemniter esse acta*. Co. Litt. 6.

5. This doctrine is alike applicable to corporeal and incorporeal hereditaments; and the most ancient and distinguished writers on the common law of England have recognized the principle that

a right to an incorporeal hereditament may be acquired by length of time. Bracton L., 4 chap. 38, 53.

6. *Easements* are especially distinguished from other incorporeal hereditaments by the absence of all right to participate in the "profits of the soil," charged with them. The right to receive air, light or water across a neighbor's land may be claimed as an easement because the property in them remains common, but the right to take something out of the soil is "*a profit a prendre*," and not an easement.

7. The number and variety of these easements is very great, according to the exigencies of domestic convenience, or the different purposes to which land and buildings may be appropriated, but of those most frequently referred to in the decisions of the courts, there are seven which are described as affirmative and three of which are described as negative easements.

8. The right to the admission of light and air by ancient windows is one of the negative easements which has been recognized in our earliest reported cases. *Bury v. Pope*, Leonard's Rep. 168, S. C. imperfectly reported Croke's Elizabeth; *Wm. Aldred's Case*, 5 Cokes' Rep. 118; *Palmer v. Fletcher*, 1 Levins Rep. 122; *Hughes v. Keene*, Yelverton Rep. 215; *Calthrop's Rep.* 41; *Godbolt's Rep.* 183; *Bulstrode Rep.* 115; *Yelverton* 225; *Newhall v. Barnard*, Balstrode 116.

In Aldred's Case, 9th Coke, it was ruled that an action lay for obstructing ancient lights; and the reason assigned is, that the hindrance of light, "*quod messuagium horrida tenebriate obscuratum fuit*" was such an injury as ought to be redressed; and a case in the 29th Eliz. is referred to, which fully sustains the position. In that case Wray, Ch. J., and the whole court of the king's bench, assign as one reason for their judgment "that it may be before time of memory, the owner of said piece of land has granted to the owner of the house to have the said windows without any stopping of them."

9. The more modern decisions are even more explicit and clear in recognizing rights of action at law and injunctions in chancery to vindicate this right to light and air after its quiet and peaceable enjoyment for the period of twenty years. *Darwin v. Upton*, 2 Wm. Saunders 175a; *Holcroft v. Heel*, 1 Bos. & Pul. 400; *Campbell v. Wilson*, 3 East 371; *Daniel v. North*, 11 East 371; *Balston v. Bensted*, 1 Camp. 463; *Bealy v. Shaw*, 6 East 208; *Barker v. Richardson*, 4 Barn. & Ald. 578; *Gray v. Bond*, 2 Brod. & Bingham 667; *Cross v. Lewis*, 2 Barn. & Cres. 686; *Parker v. Smith*, 5 Car. and Payne 433; *Sutton v. Lord Montfort*, 6 End. Cond. Chy. Rep. 257.

10. Every common law writer in England from the days of

Lord Coke to the present time, who treats at all upon the subject, recognizes the doctrine in its fullest extent. Best on Presumptions, p. 103; Brooms' Legal Maxims; Drury on Injunctions; Law of Easements by Gale and Whatley, 131 to 139; 3 Black. Comm.

11. Every Virginia common law writer has recognized the doctrine and taught it to his readers. 1 Lomax, p. 615; 2 Robinson's N. P., 672-4; 4 Rob. 806; Tucker's notes, "Ways."

12. It was recognized as a sound and just principle by the Roman civil law, and is so recognized at this day in the Code Napoleon and amongst all the continental nations of Europe.

When the admirable treatise of J. K. Angel upon the subject of *incorporeal hereditaments* was published, in 1827, not a single decision had then been rendered in the United States questioning the soundness of the common law principle in regard to light and air, and he presents the doctrine as a part of the recognized law of the country. It is true, Judge Gould, of Connecticut, in a case involving water rights, *Ingraham v. Hutchinson*, 2 Conn. Rep. 584, in a dissenting opinion threw out some *obiter dicta*, expressing dissatisfaction with the reasoning upon which that common law principle was founded. He nevertheless conceded the principle to exist, but thought it anomalous and not to be extended by analogy. Subsequently to that time, Chief Justice Savage, in the case of *Mahan v. Brown*, 13 Wend., declared "that the doctrine was too well settled to require discussion or authority to support it." So in Massachusetts, the supreme court of that State in the cases of *Story v. Odin*, and *Thurston v. Hancock*, 12 Massachusetts, 157, manifest their approbation of the modern adjudications of the court of Great Britain on that subject. In that excellent work "the American precedents of Declarations," published from the manuscripts of Chief Justice Parsons, the doctrine is fully admitted and the forms of declarations in such cases prescribed. So the chancellor of New Jersey, *Robinson v. Pettenger*, 1 Green Chy. Rep. 63, fully recognized the doctrine, and acted upon it by injunction. So the supreme court of South Carolina recognized the doctrine in its fullest extent, *M'Cready v. Thompson*, Dudley's Rep. 131. So the supreme court of Illinois, *Gerber v. Grabel*, 16 Illinois, 217.

But the case of *Parker v. Foote*, 19 Wendell, is now announced as declaring a new doctrine on the subject, and overturning the established law of centuries. It may be remarked that the opinion of Judge Bronson in that case is an *obiter dictum*, as he himself informs us "that the evidence in the case before him proves that the windows were not enjoyed as a matter of right, but only as a matter of favor." It is not then a *res adjudicata* upon the ques-



tion now before this court, but as the opinions of Judge Bronson have been extensively adopted as the founder of a new school of law, they are worthy of examination.

1. He says it "would be difficult to prove that such a principle was known to the common law prior to the year 1765."

The doctrine that a person acquired an easement to air and light by prescription, precisely as an easement was acquired to ways and flow of water, is recognized as a well established principle of the common law in all the authorities cited in head No. 8, and no case can be found maintaining the opposite doctrine. The only question has been as to the time necessary to acquire the right by prescription. The period originally fixed, July 6, 1189, first day of the reign of Richard I, was a period adopted by the court in analogy to the statute of limitations, 3 Ed. 1, chapter 29, which fixed that as the date for alleging seizin in real actions. By this equitable construction of that statute a period of legal memory was established in contradiction to that of living memory. After the statute of limitation of 38 Henry 8, and 21 James 1, fixed shorter periods of limitation in real estate actions, the same equitable analogies to those statutes, required the time for acquiring rights derived from prescription to be accordingly reduced. And this has been the current of modern adjudication, both in England and in this country. Sergeant Williams concurs in the expression of Lord Mansfield "that an incorporeal right, which if existing, must be in constant use, ought to be decided by analogy to the statute of limitations." This doctrine has been adopted and acted upon in the case of all other easements which have come before the court, such as ways and water courses, and there is no reason why the same analogy of the statute should not be extended to the easement of light and air. There has therefore never been any question of the common law principle that an easement might be acquired to light and air — while there has been a diversity of decision as to the time necessary to acquire the right. Gale & Whately's Law of Easements, chapter 5, section 1, page 90 to 98; Best on Presumption, page 103; *Read v. Brookman*, 3 East, 151.

2. "The principle has not been adopted in any of the States." This is an error. As early as 1815 the principle had been fully recognized in Massachusetts; 12 Massachusetts, 157. In the same year that Judge Bronson repudiated the doctrine, and before the date of his opinion, it had been solemnly adopted by the supreme court of South Carolina and by the chancery court of New Jersey. It has also been adopted by the supreme court of Illinois.

3. "It cannot be applied to our growing cities and villages without the most mischievous consequences." And yet manufacturing cities have sprung up in England within the last century,

with a rapidity nearly equal to our own, without the slightest check from this doctrine. So in Illinois. The great effort of modern Europe is to remodel its cities; to obliterate its narrow streets; to pull down its pent up and badly ventilated houses, and to provide everywhere a larger admission of light and air as the great preservative of health and comfort. The policy of Judge Bronson would remit us to the improvidence of the middle ages.

4. It has been argued that the doctrine is an unwise one and inapplicable to this country. These objections are well answered by the supreme court of South Carolina in the case of *M'Cready v. Thompson*, *Dudley's Reports*, page 134.

"The first argument may very properly be addressed to legislators; with judges, however, it can have no weight. The law as we find it, and not as we would have it, is to be our guide. The other argument can have as little force; the common law is the law of South Carolina as much as it is in England. It is true, if any of its principles did not comport with our political and civil institutions we would be at liberty to disregard them. But there is nothing in the principle now under consideration which renders it unsuitable to our political or civil institutions. It is a mere private right, originating in consent and perfected by lapse of time, contributing to the comfort and value of a person's habitation."

MAXWELL, J. The property owned by Dorsey has been in his actual possession and occupancy, and the actual possession and occupancy of those under whom he claims, since 1803 to the time the bill was filed in this case.

The property claimed by Cunningham as to the part thereof overlooked by the windows in the house claimed by Dorsey, was in the possession and occupancy of the owners thereof from the year 1803 to the year 1826 inclusive, and has ever since that time been in the possession of the tenants of the owners.

Upon this state of facts it is claimed that Cunningham and those claiming under him, cannot erect any building on his lot which will exclude the light or air from the windows of the Dorsey house. It is well settled by the English common law that the owner of a house or lot will be restrained by injunction and be liable to an action on the case if he makes any erections or improvements so as to obstruct the ancient lights of a house adjoining.

The Virginia convention, in May, 1776, by an ordinance then passed, declared that "the common law of England, and all statutes or acts of parliament made in aid thereof, prior to the 4th year of James the First, which are of a general nature and not local to that kingdom, together with the several acts of the colony

then in force, so far as the same may consist with the several ordinances, declarations and resolutions of the general convention, shall be considered as in full force until the same shall be altered by the legislative power of the commonwealth."

The same provision is found in the Code of Virginia, 1860, page 112, in the following form: "The common law of England, so far as it is not repugnant to the principles of the bill of rights and constitution of this State, shall continue in full force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the general assembly."

By the 8th section of the XIth article of the constitution of this State, "such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia when this constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this state until altered or repealed by the legislature."

The common law of England, so far as it is not repugnant to the principles of the bill of rights and the constitution of the State of Virginia, was in force in that State when the constitution of this State took effect, and is, therefore, the law of this State, unless repealed or modified by the general assembly of Virginia or the legislature of this State.

It becomes material in the examination of the case under consideration to ascertain what the common law applicable to the principles of this case is.

What the common law is can only be ascertained with any degree of certainty from the decisions of the common law courts on questions similar to the questions involved in any given case.

The counsel on both sides of this case have cited, as the leading case on the doctrine of ancient lights, *Bury v. Pope*. The counsel for the appellants cite the case as reported in 1 Croke, 118, while the counsel for the appellee cites it as reported in Leonard's Reports, 168.

The court decided in this case that adverse enjoyment of lights for a time which must have exceeded thirty years did not give sufficient right to the party enjoying them to enable him to maintain an action for obstructing them. Both reports agree in this. The report in Leonard contains the following, which is not in the report in Croke: "But if it were an ancient window, time out of memory, &c., there the light or benefit of it ought not to be impaired by any act whatsoever," and such was the opinion of the whole court. This case was decided in 31 Elizabeth, which I believe was in the year 1589. What was then decided was that the enjoyment of the window for over thirty years was not sufficient to enable the plaintiff to maintain his action, and what was

said by the court was that it if had been "an ancient window, time out of memory," &c., the action might have been maintained.

What was said by the court in *Bury v. Pope*, was afterwards repeatedly held to be the common law of England. William Aldred's case, 5 Coke's Reports, 58; *Hughes v. Kerne*, Yelverton's Reports, 215; *Newhall v. Bernard*, Ibid, 225. In Aldred's case, decided in 1812, Bland's case is referred to and approved, where it was said by the court in respect to the windows, that "it may be that before time of memory, the owner of said piece of land has granted to the owner of the said house to have the said windows without any stopping of them, and so the prescription may have a lawful beginning."

The last of this class of cases, holding that the use must be time out of mind, referred to, is that of *Newhall v. Barnard*, decided in 1614.

The next case referred to is that of *Darwin v. Upton*, 2 William Saunders 175a, in which it was held that the enjoyment of lights, with the defendant's acquiescence, for twenty years, created a presumptive bar to be left to a jury. *Darwin v. Upton* was decided in 1786, and has since been followed by all the cases in England.

It is apparent that the principles of the case of *Darwin v. Upton* are widely different from those of the case of *Bury v. Pope*, in respect to the time of enjoyment to give right. There must be some reason for this difference existing somewhere. Although it has not been referred to in any of the cases the reason must be found in the English statute of limitations, passed in 1623. This statute limits the right of entry into any lands, tenements or hereditaments to twenty years. Certain it is that no case of the class of *Bury v. Pope* has occurred since this statute, nor did any case of the class of *Darwin v. Upton* occur before it. It would seem plain that the modern English rule has been adopted by analogy to this statute.

If this English statute of limitation was ever in force in Virginia it was repealed by the act of 1792, repealing all British statutes theretofore in force, with certain savings.

The common law of England in force in this State as applicable to the case under consideration must therefore remain as laid down in *Bury v. Pope*, and kindred cases.

The time that the property claimed by Cunningham was in the occupancy of the owners thereof, as we have seen, was from 1803 to 1826, a period of twenty-three years. This is not sufficient time to make the windows in the house now owned by Dorsey ancient, according to *Bury v. Pope*.

The time intervening since 1826 cannot be computed against

Cunningham, because for all that time the property was not in the actual occupancy of the owners thereof, but was in the possession and occupancy of their tenants. *Daniel v. North*, 11 East, 372; Washburn on Easements, &c., 493.

The reason for this seems to be that the enjoyment by the owners of the Dorsey house of the air and light admitted by the windows was not the source of any damage to the owners of the Cunningham property for which an action could be maintained by them, and their only remedy was to build a wall or put up some other obstruction on the lot near the windows to obstruct them. This they could not do while the lot was in the possession of tenants without committing a trespass on their rights, which they are not required to do.

So far as my examination has extended I do not find any decision of any court in this country where it has been decided that the common law rule in respect to ancient lights, as settled in the case of *Bury v. Pope*, is or is not in force in any one of the United States, but the principles of the case of *Darwin v. Upton*, as applicable to this country, have been reviewed by the courts of last resort in the States of Maine, Massachusetts, Vermont, Connecticut, New York, Pennsylvania, Maryland, Alabama, South Carolina and Iowa, and have been overruled by the courts of all these States, while upon the other hand they have been reviewed and sustained only in the States of Illinois and New Jersey.

The decree complained of will have to be reversed at the costs of the appellee, and this court, proceeding to enter such decree as the court below ought to have rendered, must dissolve the injunction and dismiss the complainant's bill.

The other judges concurred.

Decree reversed.

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### COBURN v. HARVEY

SUPREME COURT OF WISCONSIN, 1864

[18 Wis. 147]

1. The common law, as amended by act of Parliament prior to the American Revolution, is in force in this state, so far as it is applicable to our condition and not modified by our constitution or statutes.

2. A landlord in this state has the common law right of distress for rent, including the right to sell the chattels distrained. (This right abolished ch. 74, Laws 1866, 2 Tay. Stats. 1168.)

Appeal from the Circuit Court for Grant County.

Action for damages for personal property alleged to have been wrongfully taken from the possession of the plaintiff by the defendants and converted to their use. The answer denies that the

plaintiff was the owner of said property or entitled to its possession, and alleges that it was the property of one Parker; that said Parker was tenant under the defendant *Carns*, under a written lease; that by the terms of said lease certain rents were due, and remained unpaid; that, in order to collect the same, *Carns* caused property to be seized and sold by the defendant *Harvey* under a "landlord's warrant of distress for rent," duly issued by said *Carns*. The plaintiff demurred to the answer, on the ground that under the laws and constitution of this state a landlord has no authority to seize, or to issue his warrant directing any other person or officer to seize, the chattels of a tenant for the failure of such tenant to comply with the conditions of the lease. The court sustained the demurrer; and the defendants appealed.

*Paine & Carter*, for appellants.

*J. A. Barber*, and *J. T. Mills*, for respondent.

*By the Court*, PAINE, J. This case presents the simple question, whether the landlord's common law right of distress for rent exists in this state. When it was first suggested, the judges of this court were all of the impression that it did not. But an examination of the question has lead us to the opposite conclusion.

There is perhaps no rule better established than that which holds that the common law, so far as applicable to our condition, exists in the states of this country, except those whose system was based upon the civil law or some other foreign code. Chancellor KENT says: "But though the great body of the common law consists of a collection of principles to be found in the opinions of sages, or deduced from immemorial usage, and receiving progressively the sanction of the courts, it is nevertheless true that the common law, so far as it is applicable to our situation and government, has been recognized and adopted as one entire system by the constitutions of Massachusetts, New York, New Jersey and Maryland. It has been assumed by the courts of justice or declared by statute, with the like modifications, as the law of the land in every state. It was imported by our colonial ancestors, so far as it was applicable, and was sanctioned by royal charters and colonial statutes. It is also the established doctrine that English statutes passed before the emigration of our ancestors and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country." Kent's Com. Vol. 1, p. 534, 10th ed.

I have sometimes heard it denied that any part of the common law was in force in this state, though I have never heard the reasoning by which that conclusion was arrived at. The same claim has, however, been made in other states similarly situated,

and to show how it has been met I will quote from a few decisions. In *Lorman v. Benson*, 8 Mich. 25, the court says: "Some reference was made on the argument to the general system of law prevailing here in view of the former history of the country, but we deem it useless to enter into any extended examination of this question. It is undoubtedly true that at one time the custom of Paris was in force here. It was expressly abrogated by the territorial legislature in 1810, and probably applied to very few cases then, if to any. Practically the common law has prevailed here in ordinary matters, since our government took possession; and the country has grown up under it. How or by what particular means it originated, would open an inquiry more curious than useful. A custom which is as old as the American settlements, and has been universally recognized by every department of government, has made it the law of the land, if not made so otherwise. Our statutes, without this substratum, would not only fail to provide for the great mass of affairs, but would lack the means of safe construction. We are of opinion that questions of property, not clearly excepted from it, must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs."

In *O'Ferrall v. Simplot*, 4 Iowa, 399, the court says: "The defendant suggests the further question, whether the complainant would be entitled to dower in this lot if she had not signed the deed. And under this he starts the query whether the common law is the law of this state. This question has been suggested in this court before, but it has not been with apparent seriousness, and therefore it has received no formal answer; and it is now pressed with an appearance demanding more than a suggestive reply. In the first place, according to our recollection of history, the common law was substituted for the civil by the Missouri Territory, of which this state was once a part. In the next place, so many rights and titles, so great interests have grown up as if by and under the common law, and not by and under the civil, that it would be the duty of a court to hold that the people brought it with them. The territory has from the beginning, including all private rights and title, been administered upon the basis of the common law; and to hold that the civil and not the common law is the law of this state, would produce startling and revolutionary effects. The extent and magnitude of the interests involved would require a court to hold to the common law. But besides this, all our laws, back to the beginning of the territory, recognize, assume the common law. They would many of them be unmeaning, senseless without it. All the proceedings of the courts would be so, and not a judgment heretofore recovered would

be valid, nor a title under it. But the ordinance of 1787 for the government of the northwest territory, made it the law of that country; and that was extended over Wisconsin, and then the laws of Wisconsin over Iowa. And although the statutes of Michigan and Wisconsin were repealed in 1840, the ordinance of 1787 was not affected, but remained in full vigor as before."

I have quoted thus at some length from these two decisions, for the reason not only that they are so applicable to the point, but that they were given by courts of states with both of which this state has in a territorial condition been connected. And all that they say about their entire system of laws having from the beginning assumed the existence of the common law, is equally true here. And, as if to remove all pretense for raising this question, our constitution itself expressly assumed the existence of the common law here, and provided that such parts of it as were then in force, not inconsistent with the constitution, should "be and continue part of the law of this state until altered or suspended by the legislature." Art. 14, sec. 13.

In addition to the cases already referred to, the following may be cited as sustaining the general proposition stated at the outset: *Sackett v. Sackett*, 8 Pick. 309; *Bruce v. Wood*, 1 Met. 542; *Commonwealth v. Churchill*, 2 id., 123-4; *Stout v. Keyes*, 2 Doug. 184; *Rue High, appellant*, id., 528; *Carter and wife v. Balfour's adm'r*, 19 Ala. 814; *Ellis v. White*, 25 id., 540; *Crouch v. Hall*, 15 Ill. 265; *Noonan v. The State*, 1 S. and M., 573; *Powell v. Brandon*, 24 Miss. (2 Cush.), 363-4.

It would require considerable hardihood in a court, in the face of such a series of decisions, in the face of the plain implications pervading our system of laws, and in the face of the express assumption in the constitution itself, to hold that no part of the common law is in force in this state.

Assuming then the correctness of the general proposition, that the common law, so far as applicable to our situation, is in force here, the question remains, whether the particular right of distress for rent exists as a part of it. If this were to be determined wholly according to the view which had been taken of it in other states, it would have to be decided in the affirmative. In most of the states its existence has been recognized; in many of them it has been modified and regulated by statute; in some it has been superseded by other statutory remedies, of an essentially similar character; and in some, after prevailing for a time, it has been abolished by law. 3 Kent, 472; *Taylor's Landlord and Tenant*, 376.

But we are not left at liberty here to settle this question either according to the action of other states, or what might have been



our own views as to its being applicable to our society. The legislative power settled that question while we were in a territorial condition. The statutes of 1339 expressly recognize the existence of this right, in the act concerning replevin, sec. 20, p. 274; sec. 33, p. 276. It will be observed that this act did not attempt to provide a right to distrain for rent. It assumed it as already existing, and regulated only the remedy of replevin where the property had been taken as a distress. Still the section last referred to did provide incidentally that if the value of the property distrained should not be found equal to the rent due, the party to whom the rent was due might "from time to time distrain again for the residue of such arrears;"—thus recognizing the right and adding new provisions to make it more effectual. Assuming then that any portion of the common law was in force here in our territorial condition, it would be impossible to exclude the right of distress for rent, after such an express legislative recognition of its existence. And being then in force, the constitution, the provision of which has already been referred to, took effect upon it and perpetuated it until changed by the legislature.

It will be remembered that in the extract first quoted from Chancellor KENT, he states it as the established doctrine, that English statutes passed before the emigration of our ancestors in amendment of the law, constituted a part of the common law of this country. A number of the cases already cited hold the same doctrine. The phrase "the emigration of our ancestors," is too indefinite to establish any fixed time which excluded subsequent English statutes for being considered a part of the common law of some at least of the colonies. For our ancestors did not all emigrate, nor were the colonies all established, at any time. And the reason given for adopting the common law with all the statutes amending it prior to a certain time, and excluding statutes passed afterwards, unless expressly adopted, precludes the idea of fixing the same time for all the colonies. That appears in *Sackett v. Sackett*, 8 Pick., where, after showing that the people of that colony brought with them the English statutes passed prior to their emigration, on page 316 the court give the following reason for holding a different rule in respect to those passed subsequently. "Our ancestors *having brought with them* an ample charter for legislation, and having in fact exercised that power as soon as they were organized a body politic, cannot be presumed to have adopted of course all the acts that were afterwards passed in the British Parliament which might alter or amend the common law, but only such as they practically received into their system and which in this manner became their common law."

It is very obvious from this that in applying the general principle, each colony would fix the beginning of its colonial existence as the dividing line between those English statutes which were and those which were not a part of its common law.

And we have come to the conclusion that in applying this general rule to a state which, like this, had no political existence before the revolution, it must, in harmony with the reasoning of these cases, be held, that when our territorial legislature and the framers of our constitution recognized the existence here of the common law, they must be held to have had reference to that law as it existed, modified and amended by English statutes passed prior to the revolution. As before shown, there was no one time applicable to all the colonies, and there is no reason to assume that we should adopt the commencement of one colony rather than another as the time applicable to us. The revolution itself is the dividing line which the reasoning of these cases would suggest for us.

This conclusion is stated for the reason that the supreme court of North Carolina, in the case of *Dalglish v. Grundy*, Cam. & Nor. 22, where they held that the right to distrain for rent did not exist in that state, based their position chiefly upon the ground that the statute of William & Mary, ch. 5, which gave the right to sell the distress, was certainly not in force there. They did not state why it was not, but it was undoubtedly for the reason given by the court of Massachusetts, that it was passed after the establishment of the colony with a power to legislate for itself. As that statute, however, was passed before the revolution, it constituted, according to the views above stated, a part of the common law relating to distress for rent, which was recognized by our territorial laws, and perpetuated by the constitution until it should be changed by the legislature.

Upon this reasoning we have come to the conclusion that the right to distrain for rent exists in this state. True, it has been seldom exercised, if at all, before this instance. But we cannot for that reason say that it does not exist. In answer to the claim that we should disregard it, we may say, as the supreme court of Mississippi said in answer to a similar claim in respect to another common law rule, "Whenever a principle of the common law has been once clearly and unquestionably recognized and established, the courts of the country must enforce it until it be repealed by the legislature, as long as there is a subject matter for the principle to operate upon; and this, too, although the reason, in the opinion of the court, which induced its original establishment, may have ceased to exist. This we conceive to be the established doctrine of the courts of this country, in every state where

the principles of the common law prevail. Were it otherwise, the rules of law would be as fluctuating and unsettled as the opinions of the different judges administering them might happen to differ in relation to the existence of sufficient and valid reasons for maintaining and upholding them." 24 Miss. 363.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

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### COMMONWEALTH v. CHAPMAN

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1847

[13 Metc. 68]

The publication of a false and malicious libel has always, by the common law of Massachusetts, been an offence punishable by indictment.

This case was argued by *Hallett*, for the defendants, and by *Porter*, (District Attorney,) for the Commonwealth. The opinion of the court was delivered, at September term 1848, by

SHAW, C. J.—This was an indictment against the defendants for a false and malicious libel, tried before the court of common pleas, and, upon a conviction there, the case is brought before this court, upon an exception which has been most elaborately argued by the learned counsel for the defendants, and which, if sustained, must go to the foundation of the prosecution; namely, that there is no law of this commonwealth by which the writing and publishing of a malicious libel can be prosecuted by indictment, and punished as an offence. The proposition struck us with great surprise, as a most startling one; but as it was seriously presented and earnestly urged in argument, we felt bound to listen, and give it the most careful consideration; but after the fullest deliberation, we are constrained to say, that we can entertain no more doubt upon the point than we did when it was first offered.

It is true that there is no statute of the Commonwealth declaring the writing or publishing of a written libel, or a malicious libel by signs and pictures, a punishable offense. But this goes little way towards settling the question. A great part of the municipal law of Massachusetts, both civil and criminal, is an unwritten and traditionary law. It has been common to denominate this "the common law of England," because it is no doubt true that a large portion of it has been derived from the laws of England, either the common law of England, or those English statutes passed before the emigration of our ancestors, and constituting a part of that law, by which, as English subjects,

they were governed when they emigrated; or statutes made afterwards, of a general nature, in amendment or modification of the common law, which were adopted in the colony or province by general consent.

In addition to these sources of unwritten law, some usages, growing out of the peculiar situation and exigencies of the earlier settlers of Massachusetts, not traceable to any written statute or ordinance, but adopted by general consent, have long had the force of law; as, for instance, the convenient practice, by which, if a married woman join with her husband in a deed conveying land of which she is seized in her own right, and simply acknowledge it before a magistrate, it shall be valid to pass her land, without the more expensive process of a fine, required by the common law. Indeed, considering all these sources of unwritten and traditionary law, it is now more accurate, instead of the common law of England, which constitutes a part of it, to call it collectively the common law of Massachusetts.

To a very great extent, the unwritten law constitutes the basis of our jurisprudence, and furnishes the rules by which public and private rights are established and secured, the social relations of all persons regulated, their rights, duties, and obligations determined, and all violations of duty redressed and punished. Without its aid, the written law, embracing the constitution and statute laws, would constitute but a lame, partial, and impracticable system. Even in many cases, where statutes have been made in respect to particular subjects, they could not be carried into effect, and must remain a dead letter, without the aid of the common law. In cases of murder and manslaughter, the statute declares the punishment; but what acts shall constitute murder, what manslaughter, or what justifiable or excusable homicide, are left to be decided by the rules and principles of the common law. So, if an act is made criminal, but no mode of prosecution is directed, or no punishment is provided, the common law furnishes its ready aid, prescribing the mode of prosecution by indictment, the common law punishment of fine and imprisonment. Indeed, it seems to be too obvious to require argument, that without the common law, our legislation and jurisprudence would be impotent, and wholly deficient in completeness and symmetry, as a system of municipal law.

It will not be necessary here to consider at large the sources of the unwritten law, its authority as a binding rule, derived from long and general acquiescence, its provisions, limits, qualifications, and exceptions, as established by well authenticated usage and tradition. It is sufficient to refer to 1 Bl. Com. 63 & *seq.*

If it be asked, "how are these customs or maxims, constituting the common law, to be known, and by whom is their validity to be determined?" Blackstone furnishes the answer; "by the judges in the several courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study," "and from being long personally accustomed to the judicial decisions of their predecessors." 1 Bl. Com. 69.

Of course, in coming to any such decision, judges are bound to resort to the best sources of instruction, such as the records of courts of justice, well authenticated histories of trials, and books of reports, digests, and brief statements of such decisions, prepared by suitable persons, and the treatises of sages of the profession, whose works have an established reputation for correctness.

That there is such a thing as a common or unwritten law of Massachusetts, and that, when it can be authentically established and sustained, it is of equal authority and binding force with the statute law, seems not seriously contested in the argument before us. But it is urged that, in the range and scope of this unwritten law, there is no provision, which renders the writing or publishing of a malicious libel punishable as a criminal offense.

The stress of the argument of the learned counsel is derived from a supposed qualification of the general proposition in the constitution of Massachusetts, usually relied on in proof of the continuance in force of the rules and principles of the common law, as they existed before the adoption of the constitution. The clause is this: Chap. 6, art. 1, sec. 6: "All the laws which have been adopted, used and approved in the province, colony or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution."

It is then argued, that it is in virtue of this clause of the constitution, that the common law of England, and all other laws existing before the revolution, remain in force, and that this clause so far modifies the general proposition, that no laws are saved, but those which have been actually applied to cases in judgment in a court of legal proceeding; and unless it can be shown affirmatively that some judgment has been rendered, at some time before the adoption of the constitution, affirmative of any particular rule or principle of the common law, such rule is not brought within the saving power of this clause, and cannot therefore be shown to exist. We doubt the soundness of this proposition, and the correctness of the conclusion drawn from it.

We do not accede to the proposition, that the present existence and effect of the whole body of law, which existed before the constitution, depends solely upon this provision of it. We take it to be a well settled principle, acknowledged by all civilized states governed by law, that by means of a political revolution, by which the political organization is changed, the municipal laws, regulating their social relations, duties and rights, are not necessarily abrogated. They remain in force, except so far as they are repealed or modified by the new sovereign authority. Indeed, the existence of this body of laws, and the social and personal rights dependent upon them, from 1776, when the declaration of independence was made, and our political revolution took place, to 1780, when this constitution was adopted, depend on this principle. The clause in the constitution, therefore, though highly proper and expedient to remove doubts, and give greater assurance to the cautious and timid, was not necessary to preserve all prior laws in force, and was rather declaratory of an existing rule, than the enactment of a new one. We think, therefore, it should have such a construction, as best to carry into effect the great principle it was intended to establish.

But further; we think the argument is unsound in assuming that no rule of the common law can be established under this clause of the constitution, without showing affirmatively, that in some judicial proceeding, such rule of law has been drawn in question and affirmed, previously to the adoption of the constitution. During that time there were no published reports of judicial proceedings. The records of courts were very imperfectly kept, and afford but little information in regard to the rules of law discussed and adopted in them. And who has examined all the records of all the criminal courts of Massachusetts, and can declare that no records of such prosecutions can be found? But so far as it regards libel, as a criminal offence, we think it does appear, from the very full and careful examination of the late Judge Thatcher, (*Commonwealth v. Whitmarsh*, Thatcher's *Crim. Cases*, 441,) that many prosecutions for libel were instituted in the criminal courts before the revolution, and none were ever quashed or otherwise disposed of, on the ground that there was no law rendering libels punishable. In the case of the indictments returned against Governor Gage and others, very much against the will of the judges, those indictments were received and filed, and remained, until non prossed by the king's attorney-general. This investigation of the history of the common law of Massachusetts is so thorough, complete and satisfactory, that it is sufficient to refer to it, as a clear elucidation of the subject.

But we think there is another species of evidence to prove the

existence of the common law, making libel an offense punishable by law, clear, satisfactory and decisive; and that is, these rules of law, with some modification, caused by the provisions of the constitution, have been affirmed, declared, and ratified by the judiciary and the legislative departments of the existing government of Massachusetts, by those whose appropriate province and constitutional duty it was to act and decide upon them; so that they now stand upon a basis of authority which cannot be shaken, and must so stand until altered or modified by the legislature.

When our ancestors first settled this country, they came here as English subjects; they settled on the land as English territory, constituting part of the realm of England, and of course governed by its laws; they accepted charters from the English government, conferring both political powers and civil privileges; and they never ceased to acknowledge themselves English subjects, and never ceased to claim the rights and privileges of English subjects, till the revolution. It is not therefore, perhaps, so accurate to say that they established the laws of England here, as to say, that they were subject to the laws of England. When they left one portion of its territory, they were alike subject, on their transit and when they arrived at another portion of the English territory; and therefore always, till the declaration of independence, they were governed and protected by the laws of England, so far as those laws were applicable to their state and condition. Under this category must come all municipal laws regulating and securing the rights of real and personal property, of person and personal liberty, of habitation, of reputation and character, and of peace. The laws designed for the protection of reputation and character, and to prevent private quarrels, affrays and breaches of peace, by punishing malicious libel, were as important and as applicable to the state and condition of the colonists, as the law punishing violations of the rights of property, of person, or of habitation; that is, as laws for punishing larceny, assault and battery, or burglary. Being part of the common law of England, applicable to the state and condition of the colonists, they necessarily applied to all English subjects and territories, as well in America as in Great Britain, and so continued applicable till the declaration of independence.

This, therefore, would be evidence, *a priori*, that they were in force, and were adopted by the clause cited from the constitution, except so far as modified by the excepting clause.

That the law of libel existed, at the first migration of our ancestors, and during the whole period of the colonial and provincial governments, is proved by a series of unquestionable authorities; and we are now to inquire, whether by the acts done since

the adoption of the constitution — acts of the judiciary and legislature — these laws, with some modification, have not been affirmed and declared in such a manner as to bring them within the provision of the constitution, and make them absolutely binding, until repealed by the legislature.

A trial occurred soon after the adoption of the constitution, in 1791, against Edmund Freeman, a printer in Boston, on an indictment for a libel upon Mr. John Gardiner, then a barrister at law, a justice of the peace, and a member of the house of representatives. It was before there were any regular reports of judicial proceedings; but, being a cause which excited much interest, it was reported for the newspapers and magazines, from which a pretty satisfactory account of it can be obtained. A good abstract of it may be found in Judge Thatcher's able judgment already cited. This case, in its various aspects, throws much light on the subject of inquiry. The prosecution by indictment was instituted and conducted by Sullivan, attorney-general, who had studied and practised the law before the revolution, was a member of the convention that framed the constitution, and was appointed a judge of the supreme judicial court, at its first organization. The trial took place before a full court, composed of Sargeant, chief justice, and Paine, Dana, Sumner and Cushing, justices. The first two must have entered on the study and practice of the law not much later than the middle of the last century, and the others but a few years later, and were men of mature years, and practicers of long experience in the law, under the provincial government. Three of these judges had been members of the convention. Their construction, therefore, of this provision, had the force and effect of a contemporaneous exposition. They were eminently within the description of Blackstone, already cited, of judges whose knowledge of that law — the unwritten or customary law — is derived from experience and study, and from being "long personally accustomed to the judicial decisions of their predecessors," and of course qualified to expound and declare the common law. The defense was conducted by Mr. Amory and Mr. Otis, eminent for their learning and talents as lawyers. It is not necessary to state minutely the particulars of this trial. It is sufficient that all the judges regarded the English common law of libel as in force here, and cited freely Blackstone, Hawkins, Cowper's Reports, and other ante-revolutionary writers and cases, as the true and authoritative expounders of the existing law of Massachusetts. Nor was the law contested by the learned counsel for the accused, in their vigorous defense; but they also cited and commented upon similar English authorities.



But we have already suggested that in sanctioning the principles of the common law of libel, as a criminal offense, the court did it with some qualification. Dana, J. in his address to the jury, mentioned that it had been objected to the doctrine of libel, that the truth of the charges cannot be given in evidence, because it is no justification, if it is true. He says this is undoubtedly the rule of law, as established by the courts of Great Britain, yet perhaps the courts here may lay down a different principle; but this must depend upon the construction which they will give to the sixteenth article in the bill of rights, relative to the liberty of the press, and which declares that it "ought not to be restrained in this Commonwealth." But he expressly reserves his opinion upon that subject, because it did not arise in that case, there being no offer to prove the truth of the charges, in defense. This reserve was manifestly founded in this consideration, viz., that the clause of the bill of rights might be so construed as to sanction the publication of everything true, however much it might tend to provoke quarrels and breaches of the peace. Should it be so construed, then it would, to that extent, modify and abrogate the common law, which, it was conceded, prohibited giving the truth in evidence, in defense. It would then be brought within the excepting clause of that other article of the constitution, declaring that all laws heretofore adopted, used and approved, and usually practised on, shall remain in force, such *parts only excepted* as are repugnant to the rights and liberties contained in the same constitution. In the case supposed, that part of the English common law of libel, which, on a criminal prosecution for that offense, prohibits the giving of the truth in evidence, will be abrogated, because repugnant to the constitution relative to the liberty of the press. But the conclusion would be, that the residue of the common law of libel would remain in force.

Afterwards, and after the constitution had been a subject of further judicial consideration, this exception, founded on the clause declaring the liberty of the press, to some extent, though not to the extent intimated by Mr. Justice Dana, was judicially declared in the case of *Commonwealth v. Clap*, 4 Mass. 163. This case was decided by a court composed of Parsons, Sedgwick, Sewall, Thatcher and Parker, every member of the bench being changed since 1791. In this case it was held, that when a man shall consent to be a candidate for a public office, conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office, and that publications *of the truth* on this subject, with the honest intention of informing the people, are not libels. And every man holding a public office may

be considered as within the principle. But the publication of a libel maliciously, and with intent to defame, is clearly an offense against law.

This case of *Commonwealth v. Freeman*, affirmed by the later case cited, is a striking illustration of the maxim, that the exception proves the rule. If there were no law making libel a criminal offense, there would be no question of defense. The adjudication, that a particular clause of the criminal law of libel is excepted by the clause in the constitution, proves conclusively that the general law, subject to such exception, was adopted and affirmed by it.

These decisions have been followed by a long course of prosecutions for libel, as a criminal offense, extending through more than half a century, in which the existence of this rule of common law has never before been doubted by any judge called, in the course of official duty, to act on the subject. We have suggested that there is another and distinct species of evidence, arising after the constitution, showing that the common law, making libels criminal, and punishing them by indictment, was adopted and continued in force. We alluded to the acts and declarations of the legislature. An act regulating the mode of prosecution and defense, in criminal proceedings for libel, is as clear an admission and declaration of the existence of the law on which such prosecutions are founded, as can possibly arise upon implication. By the Rev. Sts., chap. 82, § 28, and chap. 86, § 10, an appeal to this court is allowed to any person convicted in the court of common pleas or municipal court, upon indictment for a libel. This law, it is true, was afterwards repealed by St. 1839, chap. 161; but that does not impair the force of the implication. That implication is just as strong, by providing that on such criminal prosecution there shall be no appeal.

But a more striking declaration, of the same sort, is found in Rev. Sts., chap. 133, § 6, following, nearly in terms, the St. of 1826, chap. 107, § 1. The provisions are, that "in every prosecution for writing or for publishing a libel, the defendant may give in evidence, in his defense, upon the trial, the truth of the matter contained in the publication charged as libelous; provided, that such evidence shall not be deemed a sufficient justification, unless it shall be further made to appear on the trial, that the matter charged to be libelous was published with good motives and for justifiable ends."

These provisions, recognizing the existence of the law of libel, and directing the mode of prosecution and defense, are as distinct a declaration and affirmance of that law, on the part of two distinct legislatures, at an interval of ten years from each other, as

a statute expressly reciting the adoption and existence of this law. A declaration like this, on the part of the legislature, embracing, as it must, the authority of the governor, as well as the senate and house of representatives, not made to serve a turn, but in the ordinary course of legislation, is entitled to great weight, as evidence of the preëxisting law.

In *Commonwealth v. Clap*, 4 Mass. 167, it was stated by the attorney-general, Bidwell, that it was the constant practice of the court, in their charges to the grand juries, to mention libels as a proper subject for their inquiry; and as there was no statute animadverting on this species of offense, he drew the natural conclusion, that it must be in virtue of the common law, that they were so charged. The fact that it was the practice, so long as grand juries attended the supreme judicial court, so to charge them, is probably still within the recollection of many of the older practitioners.

These declarations of the legislature, and the contemporary exposition of the constitution by the older judges, immediately after its adoption, together with an uninterrupted course of judicial practice to the present time, form a body of proof that the common law, making the publication of a malicious libel a criminal offense, has been adopted in this Commonwealth, entirely conclusive and irrefragable; and he must be a bold judge, who should venture to decide that there is not now, and never has been, any such law, and that all the judgments which have been pronounced by the courts of this State, on convictions for this offense, have been erroneous.

*Exceptions overruled.*

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### JOHNSON v. FALL

SUPREME COURT OF CALIFORNIA, 1856

[6 Cal. 359, 65 Am. Dec. 518]

1. Wagers are recoverable in this State as at common law, except such as are prohibited by law, or are against public policy, or calculated to affect the interest, character, or feelings of third parties.

2. In a case arising for the first time in this State, the common law rule of that case will not be disregarded, and a new rule created, merely because the English Judges have frequently regretted the adoption of the rule.

3. Such a course would be a usurpation of power by the judiciary.

Appeal from the District Court of the Sixth Judicial District.

This was an action brought on a promissory note given in the following wager, as alleged in the complaint: "The defendant wagered the sum of \$5,000 with William McNulty, that a railroad, then in contemplation between Benicia and Marysville, would be completed in two years from the date of the wager.

Each party gave the other his promissory note for the sum, payable on the event. The railroad was not constructed. The note of defendant, on which this action is brought, is as follows:

"Two years after date, I promise to pay to the order of William McNulty, five thousand dollars, if the railroad is not finished from Marysville, Yuba county, to Benicia, when this note falls due.

"September 25, 1352.

JOHN C. FALL."

The complaint alleges that defendant had a large pecuniary interest in the completion of the road, and avers the assignment of the note for a valuable consideration to the plaintiff. The defendant demurred to the complaint on the ground that the wager was contrary to public policy, and affecting the interests of third parties, and that no consideration is expressed in the note or averred in the complaint.

The Court below sustained the demurrer and gave judgment for defendant. Plaintiff appealed.

*Jo. G. Baldwin and P. L. Edwards, for Appellant.*

1. There is no statute in the State forbidding wagers.

2. Wagers are recoverable by the common law when not opposed to public policy, and when they do not injuriously affect the interest of third parties. (3 Black. Com. p. 174, note 23; *Good v. Elliot*, 3 I. R. 693; *De Cesta v. Jones*, Cowp. 729; *Thassey v. Cricket*, 3 Camp. 172; 2 Selw. N. P. Rep. 1376; Cowp. 37; *S. C. Lofft*, 383; 6 Moore P. C. 300; *Bland v. Collet*, 4 Camp. 157; *Morgan v. Petver*, 4 Scott. 230; 1 Lowry, 33; *Earl of March v. Pigot*, 5 Barrons, 2802; *Pope v. St. Leger*, 1 Dal. 344; *Billing v. Frost*, 1 Esp. 235; *Mhoon v. Durden*, 12 Jur. 138; *Duladass v. Ramball*, 3 Eng. L. and Eq. 39; *McAllister v. Haden*, 2 Camp. 438; *Bate v. Cartwright*, 7 Price, 540; ——— *v. Richards*, 1 Brown, 171; *Bum v. Diker*, 4 Johns. 438; 10 Johns. 407; *Hasket v. Wootan*, 1 Nott and McC. 130; *Barnet v. Stump*, 2 But. 227; *Jeffrey v. Ficklen*, 3 Pike, Ark. 227; *Sheppard v. Sawyer*, 2 Murp. 26 R. C.; 3 Scam. 529; *Grant v. Hamilton*, 3 Mich. C. C. R. 100; *Dunman v. ———*, 1 Texas, 91; *McElroy v. Carmichael*, 6 Texas, 456; 9 Texas, 260; *Pierce v. Randolph*, 12 Texas, 295; *Kirkland v. Randen*, 8 Texas, 10; *Carson v. Rambert*, 2 Bay S. C. 560; *Ross v. Green*, 4 Harney, 208.)

3. There have been no decisions in this State against wagers. The following cases were for money won at gaming. (*Bryant v. Mead*, 1 Cal. 441; *Haight v. Joice*, 2 Cal. 26, 66; 2 Cal. 26, 81.)

4. For the Court to decree a wager against public policy, the ground for so deciding should be very clear. (*England v. Davidson*, Adol. and Ell. 856.)

5. If the policy of the law should be against all wagers, it is for the legislative and not the judicial power to declare it void. (3 Scam., *supra*.)

The wager sued on is an innocent wager, and by the common law is recoverable.

*S. J. Field* and *L. Sanders, Jr.*, for respondent.

We admit that by the common law a wager could be recovered where it was not against public policy, or immoral, or did not tend to the detriment of the public, or affect the interests, feelings, or character of third parties. Yet the English Judges, from Mansfield to the present time, have, in almost every case which has arisen, expressed regrets that they have been bound by previous adjudications to hold any bet recoverable. And the American Courts, in following the English decisions, have expressed similar regrets. As the question whether any bet can be recovered in an action in this State is presented to this Court for the first time, we would invite particular attention to the case of *Rice v. Gist*, decided by the Court of Appeals of South Carolina, reported in 1 Strobhart's Reports, page 84, where the doctrine contained in previous decisions of the Courts of that State, quoted in the appellant's brief, is overruled, and the broad principle laid down that "all wagers are unlawful on their clear immoral tendency, and not to be recovered in a Court of justice."

The Court, in its opinion, says: "I agree fully, and so do a large majority of the Court, in the opinion of the Recorder, as expressed in *Laval v. Myers*, 1 Bail. 486."

The restrictions upon the legality of wagers have been multiplied at every step by the Courts in England, as will be seen by referring to Chitty on Contracts, 496, 497. No one can read the English books without feeling that the Judges *there* loathe the fetters with which they are bound on this subject, and that they most sincerely desire to say if they could, wagers are unlawful, and cannot be recovered.

*Here*, fortunately, we are under no such restraints. The case of *Laval v. Myers*, has opened the whole matter.

But however this Court may be disposed to regard wagers in general, the wager in this case was void, because it affected the interests of third parties, and because it was contrary to public policy.

The opinion of the Court was delivered by Mr. Justice TERRY. Mr. Chief Justice MURRAY concurred.

At common law all wagers were recoverable, except such as were prohibited by law, were against public policy, or calculated to affect the interest, character or feelings of third parties. This

principle is too well established to require either argument or authority. But it is contended by counsel that, inasmuch as the English Judges have uniformly looked with disfavor on this class of cases, and have frequently taken occasion to express their regret that a different rule had not been established, this Court should, as the question is for the first time presented in the State, without regard to precedent, declare all wagers illegal, on account of their manifest immoral tendency.

Such a course would, we conceive, be a usurpation of functions properly belonging to another department of government. The common law having been adopted as the rule of decision in this State, it is our duty to enforce it, leaving all questions of its policy, as applied to a particular class of contracts, for the consideration of the Legislature.

The questions which are made in the argument of counsel, as to the general utility of the work, which was the subject of the wager, its effect upon the interest of third parties, as well as the tendency of the wager to advance or retard such work, are, we conceive, questions of fact, which cannot properly be decided by a Court on demurrer.

The judgment of the Court below is reversed, and the cause remanded.

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### WATERS v. MOSS

SUPREME COURT OF CALIFORNIA, 1859

[12 Cal. 535, 73 Am. Dec. 561]

1. In an action against a railroad company for running over a horse and killing him, the plaintiff has the right to prove the custom of the country, "to permit domestic animals to roam at large upon the uninclosed commons," where the defence is negligence on the part of the plaintiff in thus allowing the horse to run at large.

2. Plaintiff was not guilty of negligence in thus allowing his horse to run at large.

3. The rule of common law, which requires owners of cattle to keep them confined within their own close, does not prevail in this State. The common law was adopted only so far as it was not repugnant to the Constitution and statutes of the State.

4. Before the discovery of the gold mines, this was exclusively a grazing country; its only wealth consisting in vast herds of cattle which were pastured exclusively upon uninclosed lands. The custom continued to prevail after the acquisition of the country by the United States, and has been, in various instances, recognized by the Legislature.

Appeal from the Sixth District, county of Sacramento.

The facts are stated in the opinion of the Court.

Clark & Gass for Appellant.

1st. The Court erred in refusing to permit plaintiff to prove on the trial that the custom had been throughout this State, from its earliest history, to permit cattle and horses to run at large.

2d. That the Court erred in finding, as a fact, that the plaintiff was guilty of negligence in permitting his horse to run at large on the commons.

3d. That the Court erred in its conclusions of law in holding, that slight negligence on the part of the plaintiff, although remote, could relieve the defendant from all responsibility, and deprive the plaintiff of all redress for injury, although it resulted from the immediate negligence of defendant. (3 Ohio 175; 14 Conn. 293; 5 Gilm. 130; 1 Strob. 175; Swift's Dig. R. 525; 11 East, 58, 567; 1 Adol. & E. 35; 3 Carr. & P. 554; 25 Eng. C. L. 183; 38 Id. 559; 15 Id. 91; 53 Id. 53; 16 Conn. 421; 19 Id. 507; 24 Vt. 488; 23 Id. 388; 14 Paige 593.)

*Latham & Sunderland* for Respondent.

The first error complained of by appellant's counsel, is a refusal of the Court to allow, on the trial, proof "that the custom had been throughout this State, from its earliest history, to permit cattle to run at large upon the uninclosed lands in this State."

The rule of the common law was, that a man must keep his cattle on his own land, or within his own close, and was liable in trespass for allowing them to go upon his neighbor's land. But railroad companies having the exclusive right to use their roads, the very object of their incorporation forbids any joint occupation for any purpose.

In Ohio, it is held "that the company is liable for *want of such reasonable care* as is consistent with the safety of the persons and property on the train." (*Kernhacker v. C. C. & C. R. Co.*, 3 Ohio St. 172; *C. H. & D. R. R. Co. v. Watson*, 2 Ohio St. 424, 433.)

In Pennsylvania where the common law has been modified as in Ohio, the Supreme Court says that the common law rule does apply to uninclosed lands in the vicinity of railroads; and if the owner allows his cattle to run at large in the vicinity of them, he does so at the risk of losing them, and paying for their transgressions. (*N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 298; *Knight v. Albert*, 6 Id. 472.)

The same doctrine is laid down in Illinois, where they also recognize the modification of the common law rule as to cattle not being trespassers on uninclosed lands; but the Supreme Court of

that State says they do become trespassers when they wander upon the track of an uninclosed railroad, and the railroad company is not liable for killing them while on the track, unless its agents are guilty of "willful or wanton injury, or of gross negligence, evincing reckless or willful misconduct." (*Chicago & Miss. R. R. Co. v. Patchin*, 16 Ill. 198; *Great Western R. R. Co. v. Thompson*, 17 Ill. 131; *Central Military Tract R. R. Co. v. Rockafellow*, 17 Ill. 541; *Illinois Central R. R. Co. v. Reedy*, 17 Ill. 530.)

We therefore state it to be well settled law, and in accordance with the almost unanimous authority of the Courts, that a railroad company, not compelled to fence its track by special statute, is not responsible for injuries to cattle, coming upon its track, through the want of such fence, without proof of some other default.

"It may maintain an action for damages done by such cattle unlawfully coming upon its track; and, on the other hand, it is not liable to the owner for injuries inflicted on his cattle, thus trespassing, while it is in the lawful exercise of its right to the exclusive use of its track." (*Perkins v. Eastern R. R. Co.*, 29 Me. 307; *Woolson v. Northern R. R. Co.*, 19 N. Id. 267; *Cornwall v. Sullivan R. R.*, 8 Foster 170; *Hurd v. Rutland & Bennington R. Co.*, 25 Vt. 123; *Jackson v. Same*, Id. 150; *Morse v. Same*, 29 Id. 49; *Moss v. Boston & Maine R. R. Co.*, 2 Cush. 536; *Tower v. Providence & Worcester R. R. Co.*, 2 R. I. 404; *Terry v. N. Y. Central R. R. Co.*, 22 Barb. 574; *Corwin v. N. Y. & Erie R. R. Co.*, 3 Kern. 46; *Vandergrift v. Rediker*, 2 Zab. 185; *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 298; *North-eastern R. R. Co. v. Sineath*, 8 Rich. 194; *Cranston v. C. H. & D. R. R. Co.*, 1 Hardy, 193; *Williams v. New Albany & S. R. R. Co.*, 5 Ind. 11; *Alton & Sangamon R. R. Co. v. Baugh*, 14 Ill. 211; *Williams v. Michigan Cent. R. R. Co.*, 2 Gibb. 259; *Henry v. Dubuque & Pacific R. R. Co.*, 2 Clark, Iowa, 303.)

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

This is an action to recover the value of a horse killed by the cars upon the Sacramento railroad. The case was tried below without a jury. Defendant had judgment, and the plaintiff appealed.

It appears that the horse had been permitted to run at large upon the uninclosed commons. That at the time the cars were passing, the horse, in company with others, was about crossing the railroad track, upon a public road; becoming frightened, it ran along the track some hundred yards, where the road crossed an open culvert, there being a fence on each side of the track; that the horse failed in the attempt to leap this open culvert, and was run over and killed by the locomotive.



The Court below refused to permit plaintiff to prove that it was the custom in this State to permit domestic animals to roam at large upon the uninclosed commons; but held that, in so permitting his horse to roam at large, the plaintiff was guilty of negligence, and that he was not entitled to recover damages for a loss which was, in fact, occasioned by such negligence.

This was error. The rule of common law which required owners of cattle to keep them confined to their own close has never prevailed in California. Before the discovery of the gold mines this was exclusively a grazing country; its only wealth consisting in vast herds of cattle, which were pastured exclusively upon uninclosed lands. This custom continued to prevail after the acquisition of the country by the United States, and has been in various instances recognized by the Legislature.

The common law was adopted only so far as it was not repugnant to the Constitution and statutes of the State. Now, the rule contended for by respondent, and adopted by the Court below, is repugnant to no less than three statutes passed by the session of the Legislature at which the common law was adopted, to wit: The law regulating *rodeos*; the act concerning marks and brands, and the act concerning lawful fences.

If it were contemplated by the Legislature that all such animals were to be confined to the close of the owner, where was the necessity of providing for a general herding of all the cattle of a neighborhood, after notice, in order that all might attend and each select his own?

Or of requiring cattle and horses to be branded before reaching a certain age? Or the justice of providing that damages for loss of crops destroyed by cattle should only be recovered by those whose farms are inclosed by a certain description of fence?

Judgment reversed, and cause remanded.

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### CLAWSON v. PRIMROSE

COURT OF CHANCERY OF DELAWARE, 1873

[4 Del. Ch. 643]

1. The English doctrine of presumptive title to light and air, received over land of another person, arising from the uninterrupted enjoyment of it for twenty years and upward, through the window of a dwelling house, was part of the common law of England and of the colonies at the period of American Independence, and as such continued to be the law of Delaware under the constitution of the State adopted at the organization of the State Government in 1776.

2. A court of equity will restrain the obstruction of lights, by erections on adjoining buildings, only when the privation of light and air by a proposed

erection will be in such degree as to render the occupation of the complainant's house uncomfortable if it be a dwelling house, or if it be a place of business materially less beneficial than it had formerly been.

3. A fair test of what is such privation of light, etc., is the fact that a jury would give substantial and not merely legal damages.

4. The consideration that the party whose light and air is about to be obstructed, having an open space on another side of his house, can by other arrangements supply the deficiency of light and air, is not admissible to affect his right to enjoy his property after the manner in which he had previously held it.

5. Construction of that clause of the Constitution of 1776, declaring the common law of England to be in force in this State.

6. Principles for determining what parts of the English common law are inapplicable in this country.

7. The limits of judicial authority considered, with respect to alterations in the common law.

**BILL FOR INJUNCTION.**— It appeared that the complainant was the owner and occupier of a dwelling house, situated in the town of Smyrna, and adjoining on the northerly side an unimproved lot of the defendant. In the complainant's house were several windows overlooking the defendant's lot and through which light and air were received into the house. At what precise time these windows were opened did not appear: but it was proved that they had been in their present condition, and used by the successive owners and occupiers of the dwelling house for a period of over thirty-five years past. The defendant being about to remove a frame tenement to the lot and locate it against the northerly side of the dwelling house so as wholly to darken the windows, the bill was filed for an injunction to restrain the proposed obstruction. The material facts touching the precise location of the windows and the effect of the obstruction are stated in the opinion of the chancellor.

*Fulton*, for the complainant.

The single question is whether the English doctrine of ancient lights prevails in this country.

The ancient doctrine of prescriptive right founded on sixty years' possession or *user* has been abandoned in England for a century and, in lieu of it, a presumption of a grant from a twenty years' possession, assimilated to the statute, now obtains there. Whether it prevails here also is the question.

The first consideration is that colonies settling in a new country and founding a government for themselves carry with them the laws and usages of the mother country so far as they may be applicable,—more especially so when they continue subject to the mother country. This principle has given to us all the fundamental civil institutions and rights of England, the trial by jury, *habeas corpus*, etc., and the common law at large — both its principles and general modes of practice.

The opinion of the bar in this State has been always understood to be in favor of the English doctrine.

The doctrine has been adopted in some States and rejected in others. Consequently the State cases are of no authority either way. The presumption with us is in favor of the doctrine. There should be reason, and strong reason, for the departure. It is recognized in New Jersey, Illinois and Louisiana. *Robinson v. Pittenger*, 1 Greens' Ch. 57; *Gerber v. Grabel*, 16 Ill. 220; *Dune v. Boisblanc*, 1 Lou. Ann. 407.

*Pierce v. Lemon*, 2 *Houston* 219, recognizes the doctrine in this State. The doctrine was rejected from the beginning in Maine, Connecticut and Pennsylvania. In New York, Maryland and Massachusetts, the English doctrine was originally adopted, but has since been rejected.

The reasons of the older cases are sounder. The later cases proceed upon the idea suggested by Bronson, J. that the doctrine is unsuited to a new country. This is without any foundation. Light and air are as much necessities here as in an old country. They are valuable as incidents of property, as much so as a right of way. On the contrary there is more reason for it in a new country, since our towns settled rapidly and so as to afford no time for the twenty years' presumption to run. Besides there is less necessity for economizing space. The general effect of the doctrine upon the comfort and value of property is beneficial. It takes away no property but only qualifies the mode of enjoyment. The same objection taken to ancient lights would apply to a right of way; yet that is unquestioned.

The doctrine works no hardship; because the owner of the land affected may either require a written assent to hold the right permissively or he may obstruct it. His omission to do either is a consent, and works no hardship. Certainly, if the owner may, by twenty years' adverse possession, lose title to the land itself, he may with as little hardship have his mode of enjoyment qualified.

The most analogous cases are those of water courses. *Balston v. Beusted*, 1 *Camp*. 463.

The flow of the water and of light and air, neither being subjects of property, may be assimilated. In the cases cited the parties had no knowledge of the current, it being subterranean,—yet the right attached.

The doctrine of prescription applies fully to this case. *Washburn on Easements*, 18, pars. 1, 2, 3, 4; 493, par. 6; 491, par. 4; *Cross v. Lewis*, 2 *Barn. & Cress*. 686; *Higgins v. McGregor*, 1 *Harr.* 447; 3 *Kent* 441–8; *Pierce v. Cloud*, (6 *Wright*) 42 *Pa. St.* 102; *Steffy v. Carpenter*, (1 *Wright*) 37 *Pa. St.* 41.

The ancient rule differed from the modern only in the lapse of time necessary to create the right. Originally it vested only upon prescription, according to the old notion, such as went beyond present memory. The later doctrine reduced the time required by analogy to the statute of limitations to twenty years. But that the right to ancient lights might be acquired by adverse enjoyment of some lapse of time has always been the English doctrine.

The Statute of William IV can have no bearing. The doctrine was unquestionably established before. What the statute was or why passed we know not. We have not the act. All we have is Judge Bronson's reference to it in a hostile opinion. The object of the statute was to make conclusive what before was only a presumption to be left to the jury. Washburn 493, par. 6; *Gerber v. Grebal*, 16 Ills. 220.

*Massey*, for the defendant.

The question is whether the mere enjoyment of a thing so incorporeal and intangible as light and air can vest a right in conflict with rights of property. It is termed "the anomaly of the English Law," and cannot be the subject of adverse enjoyment. There is no case in the State courts precisely like this. In those where the right is sustained it has been on the ground of grant express or implied;—as, in New Jersey, where the claimant of the right had sold the land of the servient owner.

The first English case is *Ring v. Pope*, Cro. Eliz. 118, which shows the state of the law before this anomaly had crept into the law.

It was there held that a possession of thirty-eight years did not give the right. The rule was not known prior to July 19, 1775. First ruled in *Darwin v. Upton*, 2 Saunders 175, in 1786. Washburn on Easements, 497; *Parker v. Foote*, 19 Wend. 309; *Cherry v. Stein*, 11 Md. 25; *Myers v. Gemmill*, 10 Barb. 537; *Hoy v. Sterrett*, 2 Watts 331; *Haverstick v. Sipe*, 33 Pa. 368; *Carrig v. Dee*, 14 Gray 533; *Pierce v. Tumald*, 26 Me. 436. This case rests purely upon *principle*, and not on implied grant as do very many of the cases. Prescription springs from *adverse enjoyment*, of which light and air are not subjects.

The opening of a window infringes no right of the adjoining owner. He cannot prevent it by legal remedy, as in case of the adverse possession of land or exercise of an easement in it; consequently as no right is infringed, and no legal remedy to prevent it, no prescription should run against him. Acquiescence is attributed only to one who can prevent it, *i. e.* by legal means, not by a high wall, etc. *Cherry v. Stein*, 1 Md. 25.

Upon this distinction, *Robeson v. Pittinger*, 1 Green's Ch. 57;

U. S. v. Appleton, 1 Sumn. 402; Washburn 505, § 27; Napier v. Bulwinkle, 5 Rich. Law (S. C.) 311; Maynard v. Esher, 17 Penn. St. 222; illustrates the distinction between implied grant and prescription.

To adverse enjoyment there must be *corporeal* possession or *user* as of land, water, way, etc. Here there is nothing but the fact that the neighbor has forbore to prevent the passage of light, etc. Light is not another's property which is held against him as an owner so as to affect him with a prescription. Parker v. Foot, 19 Wend. 309.

In a late case in Virginia the Court said that the doctrine was still more inadmissible, if the party could otherwise obtain light and air, which in this case might be done from the other side.

The argument that our colonial relation to England would draw to us the doctrine cannot hold. For the other States were colonies. In fact this doctrine is not treated as properly a part of the common law, but an anomaly in it,—and that, even in England, it was so regarded is shown by the necessity of the Act of Parliament 2 and 3 William IV, to establish it as the law of that country.

THE CHANCELLOR.—Two preliminary objections were taken to the relief sought by the bill. One of them was this: that, even conceding to the complainant, the right claimed, to receive light and air over the defendant's lot, yet, that the proposed obstruction will not impair his enjoyment of the dwelling house in such degree as to warrant the interference of a court of equity, but that he should be left to seek redress in damages at law. The rule on this point as first announced by Lord Eldon, in Attorney General v. Nickol, 16 Ves. Jr. 337, and followed in all subsequent cases is, that a court of equity does not in all cases restrain the obstruction of lights by erections on adjoining lands, even though the right is unquestioned or established, but only when the privation of light and air by a proposed erection will be in such degree as to render the occupation of the complainant's house uncomfortable, if it be a dwelling house, or if it be a place of business, the privation must render the exercise of the business materially less beneficial than it had formerly been. Wymstanly v. Lee, 2 Swanst. 378; Sutton v. Lord Montfort, 6 Eng. Ch. R. 257; Dent v. Auction Mar. Co., 2 Law Reports, Equity Cases, 238. In the latter case Sir W. Pagewood, V. C., enables us, by an easy test, to determine what is such a substantial privation of light and air as should induce this court to relieve. He says "that where substantial damages would be given at law, as distinguished from some small sum of £5, £10 or £20 the court will interpose; and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict injury upon their

neighbor have a right to purchase him out without an act of Parliament for that purpose having been obtained."

In the present case the threatened obstruction, if the complainant's title be conceded, is sufficient, within the rule, to be the subject of equitable relief. The windows on the north side of the house overlooking the defendant's lot will be wholly closed. One of these is in the cellar, and, without this window, there could be no means of lighting and airing the cellar. Another window is in the kitchen, at the rear of the dwelling. The kitchen would be left with one window on the opposite or south side. Another window is in the attic, at present the only window in that part of the house, though a witness states that other arrangements might be made for lighting that part of the house.

Another, and the most important of the windows threatened, is on the north side of the dining room. There is no window on the south side of the dining room opening out of doors. There was such a window in former years opening into a covered porch, but some sixteen years since the porch was enclosed and made a part of the interior of the house. It so remains. Mr. Stockley, who occupied the house before the porch was enclosed, testifies that, even with the south window opened as it then was, the room could not be comfortably lighted or ventilated without the north window, the porch having a roof so low and wide as to admit but little light and air. It must be sufficiently apparent that the obstruction of these windows will very materially impair the complainant's enjoyment of his property.

But it is objected further that the complainant, having an open space on the south side of his house, can, by other arrangements, supply the deficiency of light and air, and that there is therefore no necessity for the interference of the court. Without stopping to inquire whether adequate arrangements of that kind could be made, it is enough to say that such a consideration is not admissible to affect the right of the complainant to enjoy his property after the manner in which he previously held it. If the English doctrine of ancient lights be our law and the complainant has by twenty years user acquired a title to this servitude, most clearly the title gained is the right to enjoy his dwelling as he has so long held it, and he cannot be compelled to alter his house so as to suit the convenience of his neighbor. This principle has been recently adjudged by V. C. Sir Wm. Pagewood in the case of *Dent et al v. The Auction Mart. Co.*, before cited. There the injunction was sought against the erection of a house at some short distance from the complainant's house, the effect being partially to darken a window, and one of the defenses was that the complainant could avoid the injury by enlarging his window. But the defense was

not sustained. "The complainants," says the V. C., "are clearly entitled to retain the right as they acquired it without being compelled to make any alterations in their house to enable other people to deal with their property." I have found no other case on this point in England or in America, though after diligent search.

We are then brought unavoidably to the main question in controversy, viz.: whether in this State uninterrupted enjoyment, by the owner of a tenement, of light and air received laterally over the land of another for more than twenty years, raises a title to the future unobstructed use of the same.

Incorporeal rights generally, such as ways, water courses, etc., are the subjects of presumptive title, arising from twenty years' adverse user, by analogy to the statute limiting entries into lands, and that, both in England and in this country. In England this general doctrine of presumptive title to incorporeal rights or easements includes, as one of them, the servitude of light and air. Does the law of presumptive title in this State, in like manner, extend to light and air? That is the question.

A careful reading of all that could be found to bear upon the subject, with much reflection, has led me irresistibly to the conclusion that the doctrine of presumptive title to light and air from twenty years enjoyment, as it was held in England prior to the Statute of 3 & 4 Will. IV (which simply converted the presumption of title into an absolute bar) was a part of the common law of title to real estate in England at the period of our separation from that country, and that by force of the constitution of this State, adopted in the year of its independence that doctrine became the law of this State, subject only to alteration by the Legislature.

The constitution of September 20, 1776, adopted, upon our separation from England, and organization into an independent State government, provides by Art. 25, that "*the common law of England*, as well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force unless they shall be altered by a future law of the Legislature, such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights, etc., agreed to by this convention."—Delaware Laws, Appendix, page 89.

The object of this clause was to secure to the people in their transition from a colonial to an independent political state, a jurisprudence already complete, and adequate immediately to define and to protect their rights of person and property, and of citizenship generally, without awaiting the slow growth of a new system to be thereafter matured by legislation and judicial de-

cision. They had already in their colonial state as subjects of Great Britain, an established jurisprudence in the common law of England. It was a system of jurisprudence to which our ancestors of that day were deeply attached. They had esteemed it throughout their colonial condition, to be their birthright as English subjects, and their safest rule of conduct, so declaring it in several legislative acts.—(See Preamble to Act of 1719, 1 Del. Laws, 64.)

This attachment to the common law pervaded all the colonies. The Congress of 1774, in its enunciation of certain fundamental rights and immunities which were claimed for the American subjects of Great Britain, placed among the foremost of them the declaration that they were entitled to the common law of England, as also to such English statutes as were in force at the date of their colonization, and which by experience they had found applicable to their circumstances.—1 Story on the Constitution, sec. 158, n.

The provision of our State Constitution of 1776, adopting for the new State government, the body of the common law, and in part the statutes of England, is the same in substance with the declaration of the Congress of 1774 of what had before been held to be the force of the English common and statutory law in the colonies; and the obvious purpose and effect of the 25th article of the constitution was to give the common law in this State by constitutional adoption, the same force under the new government which in their previous political condition it had by virtue of their colonial relationship to the mother country. By the common law was of course meant the common law of England as it then stood, so far as it was applicable to the circumstances of the people, and was not repugnant, as the constitution expresses it, "to the rights and privileges contained in that instrument and the declaration of rights."

We now come to the two principal questions raised by the argument, viz.:

(1) Whether the English doctrine of a presumptive title to light and air from twenty years' enjoyment, by analogy to the Statute of 21 James I, was part of the common law of England prior to 1776 — and

(2) If so, whether under our State constitution of 1776 it became the law of this State.

*First, then,* was the English doctrine part of the common law prior to 1776?

It has sometimes been spoken of as a modern doctrine. Its origin has been referred to two or three judicial decisions made between the years 1761 and 1786, viz.: *Lewis v. Price*, *Dougal v.*



Wilson, and Darwin v. Upton. Even were these cases taken to have first incorporated the doctrine into the English law they would carry it back to a period anterior to our State constitution of 1776. But it will be strictly correct to say that the English doctrine is in *its principle* a very ancient one. The principle is that uninterrupted user raises a prescriptive title to incorporeal rights and to the servitude of light and air as one of these incorporeal rights. This has been a principle of the common law from the beginning. It is true that the prescriptive period or the duration of the user requisite to raise the prescriptive title has been modified several times in the lapse of the last three centuries, but the principle of prescriptive title has all the while been the same. The last change of the prescriptive period, that which reduced it to twenty years by analogy to the statute of James, was adopted long prior to the American Revolution, and from the time of its first adoption by judicial decision applying it to any species of incorporeal rights, it became the law of all such rights, and among them, of the servitude of light and air, before even the cases just referred to for its actual application to this particular servitude had occurred. This is but a general view of the subject. Let us examine, as briefly as can be done intelligibly, the grounds on which it rests. They may be reduced to three well established facts of judicial history.

*First.* It is beyond any doubt, whatever, that the ancient common law of presumptive title to incorporeal rights founded on immemorial user, included and protected the enjoyment of light and air as one species of such incorporeal rights. This was held to be settled law as far back as the 28th Elizabeth, in *Bland v. Manly*, cited in *Aldred's case*, 9 Co. Rep. 58. That was an action at law for the obstruction of the lights of a dwelling house alleged in the narr to have been enjoyed from time immemorial, *i. e.* time whereof the memory of man runneth not to the contrary, which was the prescriptive period then in force. The obstruction was by the erection of a new building on the adjoining land of the defendant. The Court of King's Bench sustained the action, holding the prescription, from time whereof the memory of man runneth not to the contrary, sufficient to raise a presumption that, originally, there had been a grant of the privilege of having the windows unobstructed. Following this case and extending through the long interval which elapsed before the prescriptive period was finally reduced to the present limitation of twenty years by analogy to the statute of 21 James I, there were many cases, which though they did not all directly adjudge a title to light to have been acquired by the user, set up in the particular case, nevertheless fully recognized the servitude of light and air as be-

ing equally and alike with all other incorporeal rights and easements the subjects of a prescriptive title. *Pope v. Berry*, 29 & 30 Eliz., Cro. Eliz. 118; *Leon* 168; *Palmer v. Fletcher*, 15 Car. II., 1 Levinz 122; *Villiers v. Ball*, I. W. & M., 1 Show. 7; *Rosewell v. Pryor*, 2 Anne; 6 Mod. 116; 2 Salk. 459; 1 Ld. Raym. 392. Thus we see beyond any question that the rule of prescriptive title as to incorporeal rights, as at first settled in the common law, protected, as one of those rights equally and on precisely the same footing with the others, the one now under consideration.

But here we meet the fact that the ancient law of prescription has undergone several successive modifications and that the present inquiry is not whether the servitude of light and air was protected by the common law of the reign of Elizabeth, but whether by the later rule of title presumed from twenty years' possession, by analogy to the statute of James I.

*Second.* This brings me to observe a second fact in the history of this subject, which is that under the several successive modifications of the English law of prescriptive title, commencing with the most ancient rule of prescription from immemorial user, up to, and including, the comparatively modern rule of presumptive title from twenty years' enjoyment, by analogy to the statute of James, the rule, however modified at any period of its history, continued to be applied as well to the servitude of light and air as to any other species of incorporeal rights. The modifications undergone were not such as to narrow at all the scope or application of the rule of prescriptive title as to exclude at any period a species of incorporeal right which had previously been protected, but their whole operation was simply to reduce from time to time the period of prescription so as to conform it to the limitations in force for the time being for entries into lands. Let us dwell a moment here and see if such was not the true purpose and effect of the successive changes in the law of prescriptive title.

The policy just stated, of conforming the period of prescription to incorporeal rights with the statutory limitation for real actions, so as to give uniformity to the mode of acquiring possessory titles to both species of real estate, has obtained from the earliest times. Thus when by the statute of Westminster, 2 Ch. 46, 3 Edw. I., the coronation of Richard I., was fixed as the period of legal memory within which a seisin must be proved in order to maintain a writ of right, it was from thenceforth adopted as the convenient period of legal memory for all purposes and became the prescriptive period for acquiring title to incorporeal rights as well as to lands. So stood the rule until the statute of 32 Henry VIII., fixed a progressive period of limitation, sixty years, for writs of right. After this time, although, as it seems, the period of Richard's

reign continued to be nominally adhered to as the beginning of legal memory for the purpose of working an absolute bar, yet, in analogy to the statute of Henry VIII, sixty years' possession came to be considered as sufficient evidence of an enjoyment from the reign of Richard I, so as to raise a title unless rebutted by proof that the possession or user commenced subsequently to his reign. As such proof could rarely be made, the sixty years became practically the measure of legal memory. Thus the law stood until the statute of 21 James I, which limited entries into lands to twenty years. It was by analogy to this statute, that twenty years, instead of sixty, was afterward, adopted as the requisite period of user for raising a presumptive title to incorporeal rights, with this difference however, that whereas, under the statute, twenty years' adverse possession of land worked an absolute bar, the twenty years' enjoyment of an incorporeal right was held to raise only a presumptive title by grant, which might be rebutted. 2 Wms. Saund. 175 note (2.); 2 Wend. Black. 266, note (10.); 1 Crompt. Mees. & Rosc., (217.); Gale and Whatley on Easements, 65. And so the rule stood until the statute 3 and 4 Will. III., which in effect converted what before was only a presumptive title into an absolute bar; also fixing for the first time different periods for different classes of easements; among the rest fixing twenty years, as the period for raising a title to light and air. Baron Parke in 1 Crompt. Mees. & Rosc. (217.)

*Third.* We come now to notice a third point in the history of this subject, which will show quite clearly that the rule of presumptive title from twenty years' possession to the servitude of light and air was part of the common law many years prior to the American Revolution. The point is this; that whensoever the rule of presumptive title from twenty years' possession by analogy to the statute of James was adopted for incorporeal rights generally, it became thenceforth, by its own force, the law of title to light and air as one species of incorporeal rights, without awaiting the occurrence of an adjudicated case of the application of the modified rule to these particular rights; otherwise we should have this result, that while a title to some kinds of incorporeal right might be gained by twenty years' enjoyment by analogy to the statute of James, others, or at least one species, that of light and air would remain under the old doctrine of immemorial presumption requiring a period of sixty years. And thus the very principle upon which the analogy of the statute of James was adopted, viz. to give uniformity to the term required for raising possessory titles, would fail at the point where it was of most value; for certainly such uniformity of title is more important among different kinds of incorporeal rights themselves than as between in-

corporeal rights and lands — clearly then the very principle upon which the equitable extension of the statute of James proceeded, necessarily made it applicable from its first adoption to every species of incorporeal right. Every statement or explanation in the books, of this rule of analogy to the statute of James, will be found to give it this broad and unqualified scope. So Lord Mansfield puts it when he says that “an incorporeal right,” *i. e.*, any incorporeal right “which, if existing, must be in constant use, ought to be decided by analogy to the statute of limitations.” Gale & Whatley 66. And Mr. Sergeant Williams, hardly less an authority on such subjects, in his note to *Yard v. Ford*, 3 Wms. Saund. 175, in his explanation of the ground of the change, shows at the same time its scope and its uniform application to all incorporeal rights of every description.

We are now prepared for the direct question; when did the present English doctrine of presumptive title to light and air from twenty years’ enjoyment become a part of the common law? The answer is that whenever the ancient prescriptive period of immemorial user, measured at first from the reign of Richard I, as a fixed period and afterwards by sixty years, was abandoned as to immemorial rights finally, and in lieu of it the rule of twenty years, by analogy to the statute of James, was adopted by judicial decisions, which applied the modified rule to any incorporeal right whatever, it became thenceforth the law of all incorporeal rights, and as well the law of title to the servitude of light and air as to any other species of right. For the rule of analogy when applied to the first species of incorporeal right, which called for its application, was adopted as the law of the whole, and thus became by judicial decision the law of the whole.

At what time we may then inquire, was the equitable extension of the statute of James admitted as to any incorporeal right? The precise date it is not easy to determine. So great a reduction of the prescriptive period as from sixty years to twenty years, the courts in the conservative spirit of that age, were slow to sanction; and through several reigns following that of James I, the cases proceed upon the old doctrine of immemorial user. It was not until early in the eighteenth century that, pressed by the inconvenience and often impossibility of proving an enjoyment beyond legal memory, even after sixty years had become the measure of such legal memory, and also yielding to the importance of a reasonable uniformity in the law of possessory titles to real estate, the courts admitted the equitable extension of the statute of James to incorporeal rights, so far as to hold twenty years’ possession to be, not a bar, but presumptive only of an original title by grant. It is certain however that this extension of the statute was adopted

and fully incorporated into the common law of England prior to American Independence. The cases though not numerous are decisive. One case will serve to show that the presumption of title from twenty years' enjoyment of an incorporeal right was the common law rule as early as 1723, fifty years before our independence. *Keymer v. Summers*, Buller's N. P. 74, 3 Wms. Saunders, 175, b. The question there concerned a right of way over an adjoining close claimed by the plaintiff under a deed for a tenement "with all ways therewith used," the deed being executed by a third person not a party to the suit. The deed was made in 1753. The plaintiff's grantor had in fact as far back as 1723 leased the adjoining close to the defendant for three lives without any reservation of the way. Nevertheless the plaintiff's grantor had from 1723 to 1753 exercised the right of way without obstruction; and the point decided was that this user for twenty years raised in the grantor a presumptive title to the right of way sufficient to pass by his deed made in 1753.

Thus far we have considered the question as though no judicial decision holding the servitude of light and air to be within the rule of analogy to the statute of James had occurred prior to 1776, and even had no such case occurred before that date we should be obliged to hold the doctrine as having been then a part of the common law. But it does certainly appear that before the period of our separation from Great Britain, cases for the application of the new term of twenty years' presumption, by analogy to the statute, to light and air did occur, and the court without any doubt or hesitation held that the rule long before settled as a general one, extended to this species of incorporeal right. This was done in a series of cases both in the King's Bench and Common Pleas. These are *Lewis v. Price* in 1761, *Dougal v. Wilson* in 1769, and *Darwin v. Upton*, in 1789, all reported in 3 Wms. Saund. 175, a 3. The first two of these cases were prior to our independence, but no great stress need be laid on that fact. For according to the true force of these decisions they are to be taken not as introducing a new rule operating from their date, but rather as judicial declarations of the law previously in force. In this view, that is as judicial evidence of what the law had been on this point, *Darwin v. Upton* also, though decided in 1789, a few years after American Independence, is of equal force with the two cases prior to 1776; and of great value indeed is that decision as a conformation of the prior cases; for it was a decision by the Court of King's Bench sitting in banc and upon much consideration. It is worth while to examine these cases together. *Lewis v. Price*, in 1761, was an action on the case for obstructing the plaintiff's lights. The plaintiff's enjoyment of the ob-

structed lights extended back forty years, less than the old presumptive period of sixty years, required prior to the statute of James. Yet Wilmot J. held that the action would lie stating the rule as then understood, thus; "that twenty years is sufficient to give a man a title in ejectment on which he may recover the house itself, and he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house." This effect of the enjoyment for twenty years and upward, he says, is founded upon the same reason as when the lights have been immemorial, for this is long enough to induce a presumption that there was originally *some agreement* between the parties." In *Dougal v. Wilson*, in 1769, which came before the same judge sitting as chief justice there had been a possession of a house with lights from fifty to sixty years. He held that it could not be disturbed, but not resting his decision upon the length of enjoyment in that case, for he expressed his opinion to be, that "a much shorter time than sixty years might be sufficient," clearly referring to the modification of the old rule of prescription, after the statute of James, as embracing lights.

Then comes *Darwin v. Upton*, in 1789, in which the question came before all the judges of the King's Bench. The plaintiff, upon no other title than twenty-five years' enjoyment, brought his action for the obstruction of light, and he recovered before Gould, J., at Nisi Prius. The case came before the court in banc upon a rule for a new trial for misdirection to the jury, by Justice Gould. It should, however, be observed that upon the rule for a new trial no question whatever was made in that case, as to the application of the rule of twenty years' possession to the case of lights, but the exception taken was that the judge had instructed the jury that the lapse of time constituted an *absolute bar* not to be rebutted, the defendant's counsel admitting that the twenty years' possession raised a title but as he insisted a *presumptive* title only, subject to be explained away. The judges in banc, in opinions expressed *seriatim*, held such to be the law, and upon explanation by the justice who tried the case that such was the meaning of his instruction to the jury, the court discharged the rule. Says Lord Mansfield, "the enjoyment of light with the defendant's acquiescence for twenty years, is such decisive presumption of a right by grant or otherwise that unless contradicted or explained, the jury ought to believe it." Though, he adds, not an *absolute bar*, "it is certainly a *presumptive bar* which ought to go to a jury." I have before said that *Darwin v. Upton* though decided shortly after our independence, introduced no new rule as to lights, but was declaratory that the law for presumptive title for twenty years' possession, which had long before been applied to

other incorporeal rights, equally embraced this one of them. Now, this view is clearly implied in the language of all the judges. For Lord Mansfield, and Justices Willes and Buller cite prior instances of the application of the rule to several kinds of easements as controlling the case of lights. And, besides, the possession on which the plaintiff in *Darwin v. Upton* recovered, and which consequently was held to be under the operation of the rule of presumptive title, commenced before 1776, as it was a possession of twenty-five years prior to 1789; so that the recovery necessarily assumed the rule to have been a part of the law prior to 1776. It need only be added that *Darwin v. Upton*, as a case truly declaratory of the common law then settled on this subject, has been recognized in the later English cases, as by Buller J. in *Read v. Brookman*, 3 T. R. 159, and by Bailey J. in *Cross v. Lewis*, 2 B. and C. 686, 9 E. C. L. R. 223. It is difficult indeed to see how, in the face of such a judicial history, it can be doubted that at the period of our independence as a State, what is termed the English doctrine of presumptive title to light from twenty years' enjoyment, was a part of that common law which as an entire body or system, the Constitution of 1776 was so careful to continue in force.

*Secondly.* We must now return to the constitutional provision of 1776, and inquire whether by force of it, what we have seen to be the common law doctrine of ancient lights at the date of the Constitution, became the law of this State. It cannot be overlooked that notwithstanding the broad language of the Constitution, there were many parts of the common law of England, as it stood prior to 1776, which never have in fact been regarded by our courts as of force in this country; yet it is to be observed that the courts have not herein acted arbitrarily in adopting some parts of the common law and rejecting other parts, according to their views of the policy of particular rules or doctrines. On the contrary those parts of the common law of England, which have not been here practically administered by the courts, will be found on examination, to reduce themselves to two classes, resting upon grounds which render them proper to be treated as *implied* exceptions to the constitutional provision, in addition to the *expressed* exception of such parts of the common law as "were repugnant to the rights and privileges contained in the Constitution," etc.

One of these classes of exceptions may be briefly disposed of. It embraces those parts of the rules and practice of the common law which had become superseded by long settled usages of trade or business, or habits of dealing among our people, such as could not be unsettled or disturbed without serious inconvenience or injury. In such cases, upon the necessary maxim that *communis*

*error facit jus*, the courts accepted these departures as practical modifications of the common law. Many illustrations of this class might be given, such as the use of an ink scroll instead of wax and paper to constitute a seal; and such is the explanation of our long settled practice of allowing stays of execution without prejudice to the lien of a levy upon goods, a practice unknown at common law. Such instances are very numerous and need not be further referred to. But on the subject before us, there has certainly, during the century which has almost elapsed since our independence, been no known usage or custom, no general course of dealing or acting among our people, nor any apparent understanding of the law, inconsistent with the rule of a presumptive title, by user, to light and air, as well as to other incorporeal rights, such that the enforcement now of such a rule would unsettle or distress titles acquired or supposed to be acquired upon the faith of a different state of the law. On the contrary the general rule of presumptive title from twenty years' user of incorporeal rights by analogy to the statute of James I, of which the doctrine of ancient lights is but one of the applications, has always been received and frequently adjudged in our courts as part of that common law which was adopted under the Constitution of 1776. It so happens that no case has arisen for the application by the courts to light and air, of the general rule of prescriptive title, but it cannot be doubted that so far as our people have acted in matters of title, with any view to the state of the law on this question, they must have naturally presumed that the rule of analogy to the statute of James I, having been adopted from the common law and applied by the courts to such cases of incorporeal rights as had arisen for judicial decision, was adopted, not in some only of its applications at common law, but as to all. And thus we see that it is by now rejecting, and not by applying the doctrine of ancient lights, that past transactions and title heretofore acquired, or supposed to be acquired, would be unsettled and prejudiced.

We pass then to the other classes of rules which, though parts of the common law of England, have never been administered by the courts under the Constitution of 1776. This class embraces those parts of the common law which in the terms usually employed were at the period of our independence inapplicable to the existing circumstances and institutions of our people. This was a well understood limitation upon the extent to which the colonies were considered to have carried with them the laws of the mother country, (1 Black. Com. 108, 1 Story on Cons., sec. 148,) and without doubt the same limitation, though not expressed did attach to the provision of the Constitution of 1776. But this





limitation will not be found to touch the present subject. There is less difficulty in applying the limitation practically than in attempting to define it. I understand it as excluding those parts of the common law of England which were applicable to subjects connected with political institutions and usages peculiar to the mother country, and having no existence in the colonies, such for example as offices, dignities, advowsons, tithes, &c.; also, as excluding some of the more artificial rules of the common law, springing out of the complicated system of police, revenue and trade, among a great commercial people and not therefore applicable to the more simple transactions of the colonies of the States in their early history; also it may be understood as excluding or modifying many rules of what is known as the common law of practice, and possibly of evidence, which the greater simplicity, in our system for the administration of justice, would render unnecessary or inconvenient.

But, on the other hand, our early legislative and judicial history shows conclusively that what may be termed the common law of property was received as an entire system, subject to alterations by the Legislature only. Rights of property and of persons are fundamental rights necessary to be defined and protected in every civil society. The common law, as a system framed to this very end, could not be deemed inapplicable in the colonies for want of a subject-matter, or as being needless or superfluous or unacceptable, which is the true sense of the limitation in question. Certain it is, as a matter of history, that our ancestors did not so treat it. Perhaps no branch of the common law was adopted in this State so entire as this law of real estate, the whole body of which, with all its rules for defining the nature and quantity of estates in lands, for prescribing the modes of acquiring title to them, and for regulating their transmission was, from the beginning, administered by our courts substantially as in England with such modifications only as were made from time to time by the Legislature. And as a part of the common law of real estate the rule of presumptive title to incorporeal rights from twenty years' user, by analogy to the statute limiting entries into lands, has been received as the law of this State from the beginning, and frequently applied to other kinds of incorporeal rights, no case of lights before this one having arisen. Now, it was doubtless true that the common law in the very parts adopted and taking force, would in many of its special features and rules require alteration and amendment upon considerations of policy, either existing at the time of Independence or to be developed in the future. But the framers of the constitution of 1776 wisely appreciating the necessity of carrying into their new political condition some matured

and completed system of jurisprudence for defining and protecting rights of property, as well as civil rights at large, chose to adopt as such a system, the body of the common law as it then stood, giving immediate and full force in all their rules to those branches of the common law which, as a whole, were applicable and necessary, such as was the law of real estate. And taking into consideration this very necessity of future alterations and adjustments in particular features, the framers of the Constitution of 1776 provided for the necessity by developing the power to make such alterations upon the Legislature. Then, following this action of the framers of the Constitution, in exact accordance with the terms of this provision, as well as with the true and universally admitted, though not always strictly observed, line of separation between legislative and judicial power, has been the uniform practice, both of our courts and our legislatures. It is well known that much of the English law of real estate, such as the rules of inheritance, and the system of entails, were out of harmony with the genius of our people; yet these, and all other features of the common law of property, found to be inexpedient or unacceptable, were, both before and after the Revolution, excluded or modified by the Legislature only, never by the courts. It cannot be found that a single rule of property well settled as a part of the common law of England prior to the Revolution, was ever excluded from our jurisprudence by judicial decision only, although many of these rules rested originally upon reasons which had no existence in this country, and were for our people needlessly artificial; such for a single example, as the rule in *Shelly's case*. On the whole, it must be clear, from uniform judicial, and legislative practice, that the inexpediency or inutility of certain rules of the common law, forming parts of an entire system or branch, such as the law of real estate, did not render those rules subject to be judicially eliminated from the system in which they were incorporated, and then declared inapplicable to the circumstances of this country, in the sense of the implied limitation we have been considering. This was never done by the courts, even as to rules of property plainly inexpedient under the circumstances of the country *existing at the time of independence*; *a fortiori* would it be inadmissible upon considerations of policy developed in the subsequent growth or progress of the country, which, as we shall presently see, is the chief objection taken to the English doctrine of ancient lights.

It is a noticeable fact that the English doctrine was recognized without question as part of the common law by the early judges of the State and of this country; judges certainly more likely than later ones to receive correct impressions of the state of our com-

mon law as originally derived from the mother country. No early adjudged cases directly upon the point are found, but the incidental expressions of opinions in the courts, sufficiently indicated the general direction of judicial and professional opinion, as in favor of the doctrine; and this, though not authority, is evidence of no small weight that as a matter of judicial history the English rule was, at the period of our independence, regarded as part of the common law, and was not then inapplicable to the circumstances of the colonies. The first expressions of opinion in New York were decidedly that way. *Mahan v. Brown*, 13 Wend. 261 (1835); *Banks v. American Tract Society*, 4 Sandf. Ch. R. 438. In Massachusetts the early tendency of judicial opinion was in that direction, and a statute was passed in 1852 expressly excluding the English rule. Dewey, J., in *Atkins v. Chilson and others*, 7 Metc. 403 (1846); C. J. Shaw in *Fifty Associates v. Tudor*, 6 Gray, 259 (1856). So in Maryland, Dorsey, J., in *Wright v. Freeman*, 5 Harr. & F., 477. So in South Carolina, where in 1838, *McReady v. Thompson*, Dudley, 131, upon very full consideration the Court held and applied the English doctrine as to lights. In New Jersey, and in Illinois also there have been direct decisions holding the English rule in force. *Rabeson v. Pettinger*, 1 Greene Ch. R. 57; *Gerber v. Grabel*, 16 Ill. 217. It was not until the year 1838, in the case of *Parker v. Foote*, 19 Wendell, 318, that any dissatisfaction with the rule appears. That case in New York was followed in Maine by *Pierre v. Fernald*, 26 Me. 436 (1847); In South Carolina, by *Napier v. Bulwinkle*, 5 Rich. 99 (1852); In Maryland by *Cheny v. Stein*, 11 Md. 1 (1858), and in Massachusetts, by *Rogers v. Sawin*, 10 Gray, 376 (1858), and *Carrig v. Dee*, 14 Gray, 583 (1860).

The objection to the doctrine taken by these cases are two—one is that the enjoyment of light and air in a tenement received over adjoining land is not an invasion of the possession of the servient owner for which he could maintain an action, and therefore is not such an adverse user as to raise against him the presumption of a grant. This objection assumes that under the true principle of prescriptive title, the presumption of a grant arises only upon the omission of the servient owner to take a legal remedy against the easement or servitude exercised. Some learned judges have gone so far as to speak of the doctrine as “an anomaly in the law,” 19 Wend. 318. But an examination of the history of the law of presumptive title from immemorial user would show that the presumption of a grant rests on a broader ground than the one stated, that is, on the long continued acquiescence of the servient owner, not alone as evidenced by his waiver of a right of action,

but as well by his waiver of the unquestioned right to obstruct the privilege so far as exercised over his land. The other objection and the controlling one which has given to this course of decisions their direction, stated in the language of the cases, is that the English doctrine as to lights "cannot be applied in the growing cities and villages of this country without working the most mischievous consequences." *Parker v. Foote*, 19 Wend. 318. It will be observed that the first objection challenges the original technical propriety of the rule; and if tenable would support the conclusion that the doctrine of presumptive title was in the beginning erroneously applied at common law to the case of light and air. The latter objection rests upon considerations of public policy growing out of a state of the country developed since the Independence of the Colonies. Now giving to both these objections the utmost force, they still fail to meet my difficulty, which is that the doctrine of ancient lights being, in point of fact, a rule of the English common law of real estate at and prior to 1776, whether upon good technical grounds or not is immaterial; and having by force of the Constitution of that year become a part of our common law of real estate, it can be altered only by the Legislature. Meanwhile the Courts must administer the rule, as part of the common law adopted in the Constitution of 1776, without inquiring whether, on the one hand it was improperly or erroneously incorporated into the law in the first instance, or whether, on the other hand, under the increase of population and the rapid growth of our cities and towns since 1776, the rule is now found to work inconveniently or mischievously.

A few words in conclusion upon a point that has frequently pressed itself into my reflections upon this case; that is, the danger of drawing too strictly and narrowly against the Courts the limitation between the judicial and the legislative authority to change or modify rules of the common law. It is, of course, true that any system of jurisprudence, in order to meet the wants of society, more especially the common law, which less than any other, is codified, must have a progressive development, expansion and improvement, and new adaptations to changes in the condition of society and to newly arising interests, while becoming subjects of legal protection; and this slow and silent growth has been, and, of necessity, must be, in part, and to a large extent, the work of the Courts. Many and important modifications in the common law, both in its principles and remedies, have gradually and imperceptibly grown up, based upon what is termed a course of judicial decisions. There is one large field within which this moulding influence of the Courts may be legitimately and

usefully exercised. It embraces what may be termed the administration of the common law, its process, remedies, rules of practice and of evidence. In all that concerns these it is difficult to see why the Courts should feel themselves restricted in modifying and readapting them in details from time to time as experience or changes in the condition of society may render obviously expedient. For those who administer the system and are personally cognizant of the operation of its rules and modes of procedure can better comprehend the necessity, and precise extent of any changes or readaptations which may be required, and the best methods of effecting them. And certainly the conservative temper, so characteristic always of the judicial mind, renders it a safe depository of such a power. There is another department of the common law in the growth of which the influence of judicial decisions has been largely felt. This embraces all that body of rules and principles which regulate the transactions of trade and business. It is true, no precipitate, sudden or radical change in these has been ever made except by acts of legislation; such for example, as was the statute of Ann giving negotiability to promissory notes; but upon this statute there has been built up, mainly by the slow course of judicial decisions, the whole body of the law merchant. All this is an unavoidable and legitimate exercise of the judicial function. But there is one branch of the common law in which the Courts have scrupulously and wisely refrained from any judicial changes. That embraces all those rules and principles which directly concern what may be called the fundamental social rights, rights of persons and of property, especially the latter. The rules which define and protect these, operate directly upon the people whose experience under such rules is the best test of the expediency of changes in them. Hence, for such changes, legislative action only is appropriate and safe, and on such changes the Courts do not venture.

With respect to the law of property there is an additional and very important reason for this caution, *i. e.*, that judicial decisions, in theory at least, are supposed not to alter but simply to declare and administer the law; so that a decision or a course of decisions which in effect should change or modify a rule of property by declaring it otherwise than it has before been understood to be, operates retrospectively, affecting not only future titles, but also titles before acquired and transactions entered into in reliance upon a different state of the law. So great a mischief is the unsettling of confidence in titles held to be, that, rather than incur the hazard of it, the Courts have not unfrequently refrained from declaring, as a rule of property, what would have been well founded upon legal principles applicable to the subject-matter,

solely because it was apprehended that titles were resting upon a generally accepted different state of the law. A striking example, among many, of this caution is found in the English decisions which continued to deny dower to the widow out of an equitable estate of her deceased husband long after these estates had been subjected, in equity, to all the incidents of legal estates, even to the curtesy of a surviving husband. The allowance of curtesy and the denial of dower out of estates of precisely the same nature was felt to be anomalous and an unreasonable discrimination against the wife. This is acknowledged by so great a judge as Lord Redesdale, in *D'Arcy v. Blake*, 2 S. & L. 388. Courts of equity, he says, "had assumed as a principle in acting upon trusts to follow the law; and, according to this principle, they ought in all cases where rights attached on legal estates, to have attached the same rights upon trusts, and, consequently, to have given dower of an equitable estate. It was found, however, that in cases of dower, this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been acting, on the footing of dower, upon a contrary principle, and had supposed, that by the creation of a trust, the right of dower would be prevented from attaching. Many persons had purchased under this idea," . . . "But the same objection did not apply to tenancy by the curtesy; for no person would purchase an estate subject to tenancy by the curtesy, without the concurrence of the person in whom the right was vested. This I take to be the true reason of the distinction between dower and tenancy by the curtesy. It was necessary for the security of purchasers, of mortgagees, and of other persons taking the legal estates, to depart from the general principle in case of dower; but it was not necessary in the case of tenancy by the curtesy." And so dower out of equitable estates continued to be denied until finally this anomaly in the law was corrected by the Statute of 3 & 4 Will. 4 ch. 105.

Now, to apply this conservative rule of judicial action to the present case, how can it be doubted that during the long interval after the adoption of our State Constitution in 1776 until at least the year 1838 when the doctrine of ancient lights as part of the common law of this country was first drawn into question, it must have been practically recognized as the law of this State in any transaction depending upon the question; and that it would have been so adjudged had any case arisen for its judicial application? And can there be doubt that at this day there may exist in this State, rights materially affecting the value and enjoyment of property supposed to have been acquired under the

common law of ancient lights, since, as yet, no contrary rule has been declared by our courts or could reasonably have been inferred to exist? Certainly it is wise not now to risk the unsettling of such interests by judicially declaring the rule to be what, until recently, neither our courts nor the bar nor the people concerned could with reason have supposed it to be; on the other hand a legislative alteration of the law will serve all the considerations of policy which have been urged against continuing the doctrine of ancient lights, and yet by operating, as it would, prospectively, will leave undisturbed any interests which may have grown up under a reasonable belief that the old law was still in force.

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WAGNER v. BISSELL

SUPREME COURT OF IOWA, 1856

[3 Iowa 395]

1. Where the defendant by answer made a general denial and then set up a special defense and the plaintiff demurred to the whole answer, which demurrer was sustained; *Held*: that since the record, in substance, shows that the denial part of the answer was abandoned and the defendant relied upon the special grounds of defense, and admitted if they were not good the plaintiff could recover, there was no error in sustaining the demurrer, the special defense being insufficient.

2. At common law every man was bound to keep his cattle within his own close and was liable for all injuries arising from their being abroad; the owner of land was not bound to protect his premises from the intrusion of the cattle of a third person; and in case of such intrusion, he could sue for the damages or distrain the cattle; but these rules of common law are not applicable to our condition, and are in force in this state.

3. In an action of replevin for cattle, the defendant answered that the cattle did trespass upon the *uninclosed* lands of defendant to his damage fifty dollars, and while so trespassing he distrained the same as he had a right to do, and while in possession under said distraint, the plaintiff replevied the same without paying or offering to pay the damage sustained; to which answer the plaintiff demurred and the same was sustained by the court. *Held*: that the demurrer was properly sustained because the common-law rule requiring the owner of cattle to keep them within his own close is not applicable to our condition and not in force in this state.

*Appeal from the Jones District Court*

January 2, 1857

This was an action of replevin for certain cattle. Defendant answered, denying the plaintiff's right to the possession, and also alleging as a special ground of defense, that said cattle, (which he admits to be the property of plaintiff,) did on the 17th day of August, 1856, trespass upon the *uninclosed* land of defendant, and while so trespassing, and after he had suffered damage to

the amount of fifty dollars, he, said defendant, distrained the same, as he had a right to do; and while thus lawfully distrained, and while he thus rightfully had the possession, the said plaintiff, replevied the said cattle, without paying, or offering to pay, for the damages sustained. To this answer the plaintiff demurred, which was sustained. Defendant refused to answer over, and judgment being against him, he appeals.

*W. J. Henry*, for appellants.

*Joseph Mann*, for the appellee.

WRIGHT, C. J.—Appellant first claims, that there was error in rendering final judgment on the demurrer, for the reason that it was to the whole answer, and should have been overruled, as to so much as denied, or took issue upon the material allegations of the petition. This objection would be clearly good, but for the fact that the record in substance shows that this part of the answer was abandoned. An examination of the judgment satisfies us that the defendant relied upon his special grounds of defense, and admitted that if these were not good, he could not gainsay plaintiff's right to recover. By this admission he must be bound.

There is then but one question in the case, and that is, whether the defendant, for the reasons stated in his answer, was entitled to the possession of the property as against the plaintiff and owner. We are of opinion that he was not, and that the demurrer was therefore properly sustained. That at common law every man was bound to keep his cattle within his own close, under the penalty of answering in damages for all injuries arising from their being abroad, is admitted by all. And a part of the same rule is, that the owner of land, is not bound to protect his premises from the intrusion of the cattle of a stranger, or third person; and that if such cattle shall intrude or trespass upon his premises, whether inclosed or not, he may, at his election, bring his action to recover the damages sustained, or distrain such trespassing animals until compensated for such injury. We need not at present stop to ascertain the origin or reason of this rule. It is sufficient to say, that as a principle of the common law, it is well, and we believe universally, settled. We are then led to inquire whether, independent of any statutory provisions, this rule is applicable to our condition and circumstances as a people and if it is, then whether it has, or has not, been changed by legislative action? Unlike many of the states, we have no statute declaring, in express terms, the common law to be in force in this state. That it is, however, has been frequently decided by



this court, and does not, perhaps, admit of controversy. But while this is true, it must be understood that it is adopted only so far as it is *applicable* to us as a people, and may be of a general nature. At this time, we need only discuss the question, whether the principle contended for is applicable? for there can be no fair ground for claiming that it is not of a general nature.

We have assumed that it is only so much of the common law as is *applicable*, that can be said to be in force, or recognized as a rule of action in this state. To say that every principle of that law, however inapplicable to our wants or institutions, is to continue in force, until changed by some legislative rule, we believe has never been claimed, neither indeed could it be, with any degree of reason. What is meant however, by the term *applicable*, has been thought to admit of some controversy. As stated by Caton, J., in the dissenting opinion in the case of *Seely v. Peters*, 5 Gilm. 130; "does it mean applicable to the nature of our political institutions, and to the genius of our republican form of government, and to our constitution, or to our domestic habits or wants, and our necessities?" He then maintains that the former only is meant, and that to adopt the latter is a clear usurpation of legislative power by the courts. A majority of the court held in that case, however, as had been previously decided in *Boyer v. Sweet*, 3 Scam. 121, "that in adopting the common law, it must be applicable to the habits and condition of our society, and in harmony with the genius, spirit, and objects to our institutions." And we can see no just or fair objection to this view of the subject. Indeed, there would seem to be much propriety in saying, that the distinction attempted is more speculative than practical or real. For what is applicable to our wants, habits and necessities as a community or state, must necessarily to some extent, be determined from the nature and genius of our government and institutions. Or, in other words, to determine whether a particular principle harmonizes with the spirit of our institutions, we must look to the habits and condition of the society which has created and live under these institutions. We have adopted a republican form of government, because we believe it to be better suited to our condition, as it is to that of all people — and thereunder we believe our wants, rights, and necessities, as individuals and as a community, are more likely to be protected and provided for. And the conclusion would seem to fairly follow, that a principle or rule which tends to provide for, and protect our rights and wants, would harmonize with that form of government or those institutions, which have grown up under it.

But, however this may be, we do not believe that in determining as a court, whether a particular rule of the unwritten law is applicable, we are confined alone to its agreement, or disagreement, with our peculiar form of government. To make the true distinction between the rules which are, and are not, applicable, may be frequently embarrassing and difficult to courts.

Where the common law has been repealed or changed by the constitutions of either the states or national government, or by their legislative enactments, it is, of course, not binding. So also, it is safe to say, that where it has been varied by custom, not founded in reason, or not consonant to the genius and manners of the people, it ceases to have force. Bouvier's Law Dict., title Law Common. And in accordance with this position are the following authorities: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness v. Packard*, 2 Peters, 137. And see other remarks of the learned judge, in delivering the opinion in that case, page 143, which have a bearing upon the principal question involved in this.

In *Goring v. Emery*, 16 Pick. 107, in speaking of what parts of the common law and the statutes of England, are to be taken as in force in Massachusetts, SNOW, C. J., says: "That what are to be deemed in force, is often a question of difficulty, depending upon the nature of the subject, the difference between the character of our institutions, and our general course of policy, and those of the parent country, *and upon fitness and usage.*" And in *Commonwealth v. Knowlton*, 2 Mass. 534, it is said, that "our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were adjudged inapplicable to their new state and condition."

In Ohio, the rule is laid down as follows: "It has been repeatedly decided by the courts of this state, that they will adopt the principles of the common law as the rule of decision so far only as those principles are adapted to our *circumstances, state of society, and form of government.*" *Lindsey v. Coats*, 1 Ham., 243; see also *Penny v. Little*, 3 Scam. 301.

Is the rule of the common law, relied upon by the appellant in this case, applicable to our situation, condition, and usage, as a people? Is it in accordance with our habits, wants, and necessities? As applied to this state, is it founded in reason and the fitness of things? The legislature has certainly not so regarded it. On the contrary, we hope to be able to show, that what legislation

we have, clearly recognizes the opposite rule. At present, we are considering the question without reference to any legislative interpretation or action.

These same inquiries were substantially discussed in the case of *Seeley v. Peters*, above referred to; and as we could not hope to answer them more satisfactorily than is there done, we adopt the language used in that case, the appropriateness of which, as applied to this state, will be fully appreciated, when we reflect that in their resources and necessities, Illinois and Iowa are almost twin sisters. Both alike are agricultural states — both alike have large and extensive prairies — and are alike destitute of timber, as compared with the eastern and older states of the Union.

Says TRUMBULL, J., in delivering that opinion:— “However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill adapted to a new country like ours. If this common law rule prevails now, it must have prevailed from the time of the earliest settlement of the state, and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies, that they brought with them, and adopted as applicable to their condition, a rule of law, requiring each one to fence up his cattle? that they designed the millions of fertile acres stretched out before them, to go ungrazed, except as each purchaser from the government, was able to inclose his part with a fence? This state is unlike any of the eastern states in their early settlement, because, from the scarcity of timber, it must be many years yet before our extensive prairies can be fenced; and their luxuriant growth, sufficient for thousands of cattle, must be suffered to rot and decay where it grows, unless settlers upon their borders are permitted to turn their cattle upon them. Perhaps there is no principle of the common law so inapplicable to the condition of our country and the people, as the one which is sought to be enforced now, for the first time since the settlement of the state. It has been the custom of Illinois, so long that the memory of man runneth not to the contrary, for the owners of stock to suffer them to run at large. Settlers have located themselves contiguous to prairies for the very purpose of getting the benefit of the range. The right of all to pasture their cattle upon uninclosed ground is universally conceded. No man has questioned this right, although hundreds of cases must have occurred where the owners of cattle have escaped the payment of damages on account of the insufficiency of the fences through which their stock have broken; and never till now has the common law rule, that the owner of cattle is bound to fence them up, been suffered to prevail, or to be

applicable to our condition. The universal understanding of all classes of community, upon which they have acted by inclosing their crops, and letting their cattle run at large, is entitled to no little consideration in determining what the law is; and we should feel inclined to hold, independent of any statutes upon the subject, on account of the inapplicability of the common law rule to the condition and circumstances of our people, that it does not, and never has, prevailed in Illinois."

The learned judge then proceeds to show, that it is not necessary to assume that ground in the case before him, for the reason, as he says, that their entire legislation clearly shows that this rule of the common law never prevailed in that state. In like manner, we now propose to refer to some of our legislation, which we think, will clearly show that it was never supposed to prevail in this state. And in doing so, we shall confine ourselves to the Code and the laws passed subsequently thereto; for up to that time, we believe it to be conceded, that this rule of the common law did not obtain in Iowa.

Chapters 52 and 53 of the Code, relate to the rights and duties of adjoining owners, in building and keeping up partition fences, and the right of a party to recover damages, where the trespassing animal enters upon the injured land from an adjoining close. Nothing is said as to the duty of the party to keep a fence against trespassing animals, *not* upon an adjoining inclosure. Neither by the Code, have we any definition of a lawful fence. The only provision that seems to bear upon the question, is to be found in section 114, which gives the county judge the power to submit to the people of his county, the question, "whether stock shall be permitted to run at large, or at what time it shall be prohibited?"

By chapter 105, Laws of 1853, however, a *lawful fence* is particularly described and specified. And this chapter has, beyond doubt, reference to the outside fences of an inclosure, as contradistinguished from the partition fences which are provided for by the Code. Any comment upon the object and purpose of this statute, we will reserve until we have referred to others, which we think have a legitimate bearing upon the question before us. Chapter 104 of the same laws, relates to the taking up of "water crafts, lost goods, and estrays." In section 8 of this act, is found this language: "Provided, that nothing in this act shall be so construed as to authorize any person to take up or stop any stray animal, between the first day of May and the first day of November, unless the same be a work beast, and manifestly straying from its owner." In 1851 an act was passed submitting to the people of the counties of Scott, Cedar and Jones, the question,

whether swine and sheep, or either of them, should or should not run at large within those counties. The election was to be held by ballot, and if a majority of the votes cast, in either of said counties, should be either "swine not at large," or "sheep not at large," or both not at large, *then* the owners thereof were required to *restrain the same from running at large*; "and in the event of a failure so to do, he shall be liable for any and all damages done by his swine and sheep, or either of them, so running at large, to be recovered by action of trespass, by the party injured." Laws of 1851, chapter 33. At the same session, a similar act was passed, "restraining swine from running at large in Jackson county." Chapter 73, 173. In 1855 we find an act "prohibiting certain male stock from running at large." By this act it is provided, that no stallion, or jack, bull, boar, or ram shall, after the taking effect of the same, be allowed to run at large; and any person aggrieved is authorized forthwith to restrain such animal and give immediate notice thereof to the owner, and if the owner of such animal, after being notified, shall refuse to keep up or prevent such animal from running at large, he is subject to a fine not exceeding five dollars, for every such offense. Laws of 1855, chapter 135.

This brief reference to these several acts must be sufficient, in our opinion, to satisfy any mind that the legislature never understood that the rule of the common law prevailed in this state. We do not maintain that these provisions expressly change the common law rule. And did we believe that this principle had, at any time, been well established in this state, we should perhaps hold that it had not been changed by these different statutes. Where, however, it is, to say the least, doubtful, whether the rule contended for is in accordance with our situation, condition, and wants as a people — where for a series of years there has been no legislation recognizing the existence of such a rule — and where custom and habit have uniformly negatived its existence, we feel entirely justified in giving force to these acts, which if they do not expressly, certainly do impliedly, change the unwritten law.

Let us ask, upon what other fair hypothesis it is, that a reason can be found for the passage of these several acts? If the common law rule, requiring the owner to keep up his stock prevails, or has prevailed, in this state, where the necessity or propriety of this legislation? What object could there be in defining a lawful fence, if no man is required to inclose his cultivated lands? If no fence is required to keep out stock, why so particular in saying what shall constitute a lawful fence? Again, if no stock are allowed to run at large, why it is that an estray animal, other than those of a certain kind, cannot be taken up for six months of each

year? Can any person for a moment, believe that the legislature could have contemplated that it was contrary to law for such animals to be out of an inclosure, and at the same time pass an act that they should not be taken up for half of each year?

And again, if the common-law rule prevails, why pass two several acts, authorizing the people of Jackson, Jones, and other counties, to determine by an election, whether certain animals should, or should not, run at large — and in those acts provide, that if the majority decided *against* these animals running at large, then the owners were to restrain the same, but make no provision that the owners were to be liable, if the majority should be the other way? If they were bound to restrain the same anyhow by the general law, why these special statutes? And with how much force does the argument derived from these laws, apply to the case before us, which arose in Jones county, one of the counties named in the act of 1851? Why pass this law for the benefit of the county, if already the general law was, as is claimed by the appellant? But, once more, if all stock is to be kept inclosed, what necessity was there for the act of 1855, prohibiting certain male animals from running at large? According to appellant's argument, they were not allowed, and this law was therefore unnecessary. We cannot believe that all these acts were passed without an object. We are bound to believe that the legislature acted with reference to the law as it stood, and that they understood it to be, that stock might lawfully run at large, and that the owner thereof was not liable for any injury sustained, unless the person injured had an inclosure — an inclosure made by a lawful fence. And in the language of the case from Illinois, before quoted, "if there ever was a case where cotemporaneous construction and acquiescence could be properly resorted to, for the purpose of ascertaining the law, this is surely that case, both as regards the right of stock to run at large, and the necessity for fencing against them." And if, in the language of Mason, Ch. J., in *Hill v. Smith, et al.*, Morris, 70, custom can, when long acquiesced in, recognized, and countenanced by the sovereign power, repeal as well as make laws, then it certainly may change a principle of the common law. And especially so, when the legislature, by the enactment of statutes, recognized by implication at least, a rule that is clearly at variance and incompatible with the former one, or the one existing at common law.

*Judgment affirmed.*

HORSLEY *v.* HILBURN

SUPREME COURT OF ARKANSAS, 1884

[44 Ark. 458]

EAKIN, J.— \* \* \* The first colonial charter under which the English were permanently planted in America, was granted by James I, in the fourth year of his reign, to a company of business adventurers in London, who established their colony at Jamestown, in Virginia. The colonists had prescribed to them no code of laws beyond a few political regulations. For the regulation of their private affairs they brought with them, as Englishmen, the body of laws which governed at home, and which, except as changed by the colonial or parliamentary regulations, or as rendered inapplicable to their peculiar circumstances, was recognized and administered by the courts of the colony. This body of laws formed the basis of the jurisprudence of Virginia, and the other States of the South, formed in whole or in part out of her vast original territory.

After the purchase by the United States, from the French, of the territory west of the Mississippi, that portion of it out of which Arkansas and Missouri were afterwards created, was largely settled by immigrants and pioneers from Virginia, Kentucky, North Carolina and Tennessee, which had been themselves formed, wholly or in part, out of the territory of the original Jamestown colony. They too brought over the Mississippi the same birth-right which their ancestors had brought over the ocean.

In the year 1816, whilst this constituted a part of the Missouri territory, it was enacted that:

“The common law of England, which is of a general nature, and all the statutes of the British Parliament in aid of, or to supply the defects of, the said common law, made prior to the fourth year of James I, and of general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, or inconsistent with, the Constitution and laws of the United States, shall be the rule of decision in this territory until altered or repealed by the Legislature.”

This statute remained to govern the subsequently formed territory of Arkansas, and was afterwards re-enacted as a part of the laws of the State, with some change of phraseology and grammatical arrangements. Rev. Stat., chap. 23, sec. 1; Mans. Digest, § 566.

Originally, as it first emerges into the dim light of judicial history, the common law was of small proportions, dealing with the few interests and simple habits of a plain rural population. It expanded with the advance of civilization, the growth of trade, and the more diversified and complicated interests of social life. This growth was due mostly to the courts, but was aided from time to time by statutes, more or less ancient, changing it, or enlarging the application of its principles. Meanwhile there gradually grew up a system of equity jurisprudence, with principles and modes of procedure distinct from those administered in the courts of common law. Although originally the common law consisted wholly of usages and maxims established in times so remote that the memory of man ran not to the contrary, and although this, strictly, is what is meant by the common law, yet with the importation of the feudal system, with its radical changes of the laws regulating lands, and with the necessary legislation which thereupon arose, the common law came in time to be commonly understood to mean that body of laws which had been modified by the feudal system and ancient statutes, and which was administered in the courts of law, in contradistinction with that body of laws administered in courts of equity, and also with those recent statutory changes which had been made in the old common law, after the latter had been adopted, and for a long time had obtained in the administration of justice by courts of common law. It was to preclude the idea of its ancient and strict sense, and manifest the policy of adopting it in its more popular sense, with the addition of *all* statutes modifying and changing it, down to the fourth year of James, that our statute makes allusion to these statutory changes.

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## GORDON v. THE STATE

SUPREME COURT OF GEORGIA, 1893

[93 Ga. 531-535, 21 S. E. 54, 44 Am. St. Rep. 189]

1. Presumptively a boy under the age of fourteen years is physically incapable of committing the crime of rape, and hence it is incumbent upon the State to prove his capacity, in order to warrant a conviction for the offense of assault with intent to commit a rape.

2. Upon the trial of a boy between the ages of ten and fourteen years for any offense, it is not error to give in charge to the jury section 4294 of the code. That section relates alone to mental capacity.

Indictment for assault to rape. Before Judge HENRY. Floyd superior court. September term, 1893.



The accused was 13 years and 27 days old, according to the testimony of his father. According to the testimony of the girl alleged to have been assaulted, she was 10 years old at the time, and was in the road on her way to school, when the defendant, walking about four feet from her and in the same direction, accosted her with the expression, "Howdy sweetheart," and made an obscene statement manifesting his purpose to have sexual intercourse with her immediately. She had said nothing to him. He started after her, and she ran and called her mother, who was in her house hard by. The mother responded to the call, and before she came defendant ran off down the road. Other inhabited houses were not far from the place, which was in a cleared grove. Several witnesses testified that it was too open for a person to hide; on the other hand there was testimony that one could have hidden in the shrubbery only a short distance from the spot. Defendant's aunt testified that she was sitting in her house near the road when the child went by, and saw the defendant on the other side of the road sixty feet from the girl; and that if anything passed, witness did not see it. The child testified that she had never spoken to defendant, nor that she then said to him, "Hello, black Dick," nor anything else, but that "among us children it was common for us to call Dick Gordon black Dick; that's what we called him." The defendant stated, that when the girl got opposite him in the road she said, "Hello, black nigger Dick"; to which he replied, "You had better go on and let me alone. I'll hurt you if you don't." She said, "I will tell ma if you do," and he replied, "I don't care if you do tell your ma." As he went on up the road she called her ma two or three times, and her ma came out there, and he kept walking down the road. He did not know what she told her ma; but that was all he said to the girl. His counsel conceded that he was a boy of ordinary intelligence for his age, and knew right from wrong; but denied his physical capacity to commit the crime charged, and insisted that such capacity must be proved.

The motion for new trial alleges that the verdict was contrary to law and evidence; that the presumption is conclusive that the defendant was incapable of committing the crime; that the court erred in charging the jury in the language of section 4294 of the code, for this section was inapplicable to the case and was calculated to confuse and mislead the jury; and that the court erred in refusing to charge the jury thus: "If the evidence shows the defendant to have been under the age of fourteen years at the time crime is alleged to have been committed, then the law presumes, from defendant being under the age of fourteen years, that the

defendant was physically incapable of committing the offense of rape; and it would then be incumbent upon the State, if defendant was under the age of fourteen years, to show by proof that defendant did have the physical capacity to commit the offense of rape, by having carnal knowledge of a woman; if defendant had no capacity to have sexual intercourse, then he could not be guilty of rape, and if defendant was incapable of committing rape, he could not be guilty of an attempt to commit rape."

G. A. H. Harris, for plaintiff in error.

W. J. Nunnally, solicitor-general, *contra*.

SIMMONS, Justice.—By the common law of England, a boy under fourteen years of age cannot be convicted of rape. In Hale's Pleas of the Crown it is said that an infant under that age "is presumed in law to be unable to commit a rape, and therefore, it seems, cannot be guilty of it; and though in other felonies *militia supplet aetatem* in some cases, \* \* \* yet it seems as to this fact the law presumed him impotent, as well as wanting in discretion." (Vol. 1, p. 629.) This presumption of physical incapacity is based upon the fact that in England puberty is very seldom attained, among males, under that age. The age of puberty, however, is governed to a great extent by race and climate, and it is well known that in this country, and especially in the southern part of it, instances of puberty among boys under fourteen years of age are not uncommon. If the common law rule on this subject were adhered to in this State to the extent of treating the presumption as conclusive it would afford immunity to a large number of persons capable of committing rape or who have actually committed it, and thus in many instances defeat the ends of justice. The common law was adopted in this State so far only as applicable to the conditions existing here (see *Turner v. Thompson*, 58 Ga. 271); and there being no statute of Georgia establishing any presumption of this kind, the rule in question, in so far as it treats the presumption as conclusive, cannot be regarded as a part of the law of this State. The rule has to this extent been held inapplicable in other States. (*People v. Randolph*, 2 Park. Crim. Rep. (N. Y.) 174; *Heilman v. Commonwealth*, 84 Ky. 457, 4 Am. State Rep. 457; *Williams v. State*, 14 Ohio 222, 45 Am. Dec. 526; *Wagoner v. State*, 5 Lea, 352, 40 Am. Rep. 36; and see *McKinney v. State*, 29 Florida, 565, 30 Am. State Rep. 140.) In none of the States, however, except Louisiana, so far as we have been able to ascertain, has it been held that there is no presumption at all as to the incapacity of boys under that age; and the reason assigned for so holding in

Louisiana is, that in that State "a large majority of youths attain puberty before the age of fourteen years." (State v. Jones, 39 La. Ann. 935.) It cannot be said that this is so in Georgia; on the contrary, it is quite probable that a large majority of youths in this State do not attain puberty until after that age. We think the proper rule, as applicable to the conditions existing in this State, is that announced by the courts of other States in the decisions above referred to, namely, that there is a presumption of physical incapacity as to all boys under the age of fourteen, but that this is merely a *prima facie* presumption, subject to be rebutted by proof. Thus modified, we think the presumption is just and reasonable, certainly not less so than the presumption recognized by our law as to the mental incapacity of boys under that age. There has been some question as to whether this rule applies also to assault with intent to rape, but we think the better opinion is that it applies to both offenses. See discussion of this question in People v. Randolph, 2 Park. Crim. Rep. (N. Y.) 213; see also Rex v. Groombridge, 7 Carr. & Payne, 582; Rex v. Eldersham, 3 Id. 396; Rex v. Phillips, 8 Id. 736; Williams v. State, 14 Ohio, 222; 1 Bishop Crim. Law (Ed. 1392), § 746 (2). The evidence in this case being uncontradicted that the accused was under fourteen years of age at the time the offense was alleged to have been committed, we think the court ought to have given in charge the instruction requested on this subject, as set out in the fourth ground of the motion for a new trial. There being no proof of actual capacity, and there being room for doubt, under the evidence, as to whether the accused intended or was attempting to commit rape, this error requires a reversal of the judgment denying a new trial.

2. Upon the trial of a boy between the ages of ten and fourteen years for any offense, it is not error to give in charge to the jury section 4294 of the Code. That section relates alone to mental capacity.

*Judgment reversed.*

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### NELSON v. McCRARY

SUPREME COURT OF ALABAMA, 1877

[60 Ala. 301]

1. The ancient common law of England, in its entirety, never prevailed here, but only such parts of it as were not inconsistent with our institutions and public policy, as deduced from statutory and constitutional provisions; and English statutes, enacted prior to the immigration of our ancestors to this country, prevailed to the same extent, as a part of that common law.

2. The subjection of lands by legal process to the payment of debts is not in Alabama, the mere consequence of statutory remedies, which the legislature may wholly take away, or practically abrogate. The statute of 13th Edw. 1, ch. 18, which gave a judgment creditor a writ of *elegit* against his debtor's lands, was in force here, as a part of the common law, during the five years of organized government which preceded its re-enactment in substance by the act of 1807 (Clay's Digest, 199, § 1). The settled law and policy of the State has always been to subject lands, equally with personal property, to the payment of debts; and while the legislature may change, modify, or enlarge existing statutory remedies, it cannot, without violating the federal constitution, take away all remedy for the enforcement of existing contracts, nor substitute new remedies which impair the value and benefit of such contracts.

3. The right to a homestead exemption, as against the claims of creditors, is to be determined by the law which was of force when the debt was contracted, and not by a subsequent law which was of force when the property was acquired; such subsequent statute, when enlarging homestead exemptions, cannot operate on existing contracts without impairing their obligation.

4. As to debts contracted after its adoption, the constitution of 1868 superseded all former exemption laws, and governed all homestead rights until the passage of the act approved April 23, 1873, which enlarged the homestead from eighty to one hundred and sixty acres; but, as against debts contracted in 1872, this statute cannot apply, so as to give the enlarged homestead in lands acquired after its passage.

5. The statute regulating the assignment of a homestead, when claimed by a defendant in execution (Rev. Code, § 2881), applied only to the homesteads which were exempted by the laws of which it was a part, and was directory merely: a failure on the part of the sheriff to comply with its provisions was a mere irregularity, which might be a ground for an application to set aside the sale, but did not invalidate the title to the purchaser, who bought subject to the claim of a homestead exemption.

6. In a case at law, there is no rule of practice which allows the appellee to assign errors on the record of account of adverse rulings of the court below shown by the appellant's bill of exceptions.

Appeal from the Circuit Court of Hale.

Tried before the Hon. GEORGE H. CRAIG.

This action was brought by James W. McCrary, John E. Love, and William G. Miller, against Jabez C. Nelson, to recover the possession of a certain tract of land, containing one hundred and forty acres, which was described in the complaint as "the north half of the south-west quarter of section fifteen (15), and the south-west quarter of the north-west quarter of section fifteen (15), and the east half of the south-east quarter of the north-east quarter of section sixteen (16), in township nineteen (19), range four (4) east;" together with damages for its detention. The defendant pleaded "not guilty, in short by consent, with leave to give in evidence any special matter in bar;" and the trial was had on issue joined on this plea.

The plaintiffs derived their asserted title to the land under a purchase at sheriff's sale, made on the 31st day of July, 1876, under two executions against the defendant, hereinafter more particularly described; and they produced and proved the sheriff's deed, the executions with their levies, the judgments on which

the executions were issued, and the debts on which the judgments were founded. The defendant claimed the land as a part of his homestead exemption, and also insisted that the sheriff's sale and deed were void. One of the two judgments, under which the land was sold by the sheriff, was in favor of said James W. McCrary; was rendered on the 3d April, 1873, for \$278.96, and was founded on the defendant's promissory note for \$258.24, dated the 25th day of March, 1872. An execution on this judgment was issued on the 29th April, 1873, which was returned "No property found;" and an *alias* was issued on the 6th June, 1876, which was levied on the land in suit. The other judgment was in favor of said John E. Love and William G. Miller, and was rendered on the 21st April, 1876, for \$430.17, the balance due on a promissory note, signed by the defendant (with two others), and dated the 15th October, 1872. An execution was issued on this judgment on the 18th May, 1876, and was levied on the lands in controversy. Besides the lands now sued for, said executions were at the same time levied on another tract containing twenty acres, on which were situated the defendant's dwelling-house, out-houses, etc., and which was described in the levy as "the south half of the north-east quarter of the south-east quarter" of said section sixteen. The lands levied on, containing in all one hundred and sixty acres, were sold and conveyed to said defendant by James W. Locke and wife, by deed dated 22d December, 1874, which recited a consideration of \$2,500. They lay in one contiguous tract, except that the twenty-acre parcel, on which the buildings were situated, were separated from the other portions by a tract containing forty acres, which belonged to defendant's wife; and, which said forty acres, making two hundred acres in all, were used and cultivated by the defendant as his homestead farm or plantation, on which he also resided. There were no houses, or buildings of any kind, on any part of the land sued for, all the improvements being placed on the twenty acres on which the dwelling-house was situated.

The executions were levied on the 7th June, 1876; and on 14th June the defendant filed with the sheriff an affidavit and claim of exemption to the lands, as "exempt to him under the constitution and laws of Alabama, as an actual *bona fide* resident and the head of a family." On the 31st July, 1876, the day of the sale, the defendant read to the crowd a written notice, forbidding the sale, and asserting his claim to the lands as his homestead exemption; claiming eighty acres of the tract, which were described by their numbers, as exempt under the constitution, and the other eighty acres as exempt under the act approved April 23, 1873. The sheriff proceeded with the sale, and sold the entire tract of land,

dividing it into two parcels of eighty acres each; and the plaintiffs in execution became the purchasers of each tract, at the price of \$5.00 for the parcel which included the dwelling-house, and \$50.00 for the other parcel. The sale was declared to be made "subject to all claim of exemption by the said J. C. Nelson under the constitution and laws of Alabama," and was so expressed in the sheriff's deed to the purchasers. The value of the entire tract, comprising the twenty acres on which the houses were situated, was estimated by the witnesses at from \$1,600 to \$2,000.

The above being, in substance, the material facts disclosed by the evidence, several charges in writing were requested by each party, some of which were given by the court, and others refused; each party reserving exceptions to the refusal of the charges asked by himself, and to the charges given at the instance of his adversary. The charges to which exceptions were reserved by the defendant, and which he here assigns as error, instructed the jury, in effect, that the constitution of 1868 repealed all exemption laws then of force, except as to existing debts; that the constitution only exempted eighty acres as a homestead, and was the only exemption law in force up to the passage of the act approved April 23, 1873, except as to debts existing when that constitution became operative; that the said act of 1873, enlarging the homestead to one hundred and sixty acres, did not apply as against debts created prior to its passage, although they were reduced to judgment after its passage; and that the failure of the sheriff to have the homestead appraised and set apart by metes and bounds, under the claim of exemption, was a mere irregularity, which did not invalidate the sale, and was not available in defense of this action. Under the charge of the court, the jury returned a verdict for the plaintiffs for eighty acres of land.

*Wm. G. Jones*, for the appellant.

*Thomas J. Seay*, contra.

BRICKELL, C. J.—It is certainly true that, by the ancient common law, personal estate only could be subject to the payment of debts. The reason was: "That it was only a chattel that was lent, and therefore the chattels of the debtor were liable only to pay it; and formerly men trusted one another no farther than they had visible chattels to answer the debt. The lands were not liable, because they were obliged to answer the duties to the feudal lord; and a new tenant could not be forced upon him, without his consent to the alienation; and the person was not liable, because that was obliged by the tenure to serve the king in the wars, and the several lords at home, according to the distinct natures of their tenure." 3 Bac. Abr. 663. The connection between the

lord and the tenure—to secure the former the duties and services the fief bound the latter to render, and to prevent the transfer of these services and duties to another whom the lord had not accepted as a tenant, operated restraints on alienations by the act of the tenant, as well as by the acts of the law. 3 Black. Com. 419. This doctrine of the common law was never adapted to our condition, or to the nature of the tenure of real estate known to our laws, and was never a part of our jurisprudence. The common law of England is not, in all respects, the common law of this State. It was adopted, and prevails here, only so far as it is consistent with our institutions, and the public policy of the State, as deduced from our legislation. *N. & C. Railroad Company v. Peacock*, 25 Ala. 229; *Barlow v. Lambert*, 28 Ala. 704; *Simpson v. State*, MSS.

The feudal restraints on the alienation of lands and subjecting them to the payment of the debts of the owner, the growth of commerce compelled legislation in England to remove, long prior to the immigration of our ancestors to this continent. The statute of 13th Edw. I, chap. 18, gave a judgment-creditor a writ of *elegit*, by which the sheriff was required to extend to him one half the debtor's lands to be retained until the debt was satisfied. 3 Black. Com. 419. The principle is well settled, that English statutes, passed before the emigration of our ancestors, so far as consistent with our institutions and government, unless repealed, constitute a part of the common law prevailing in the States of a common origin. *Carter v. Balfour*, 19 Ala. 814; *Horton v. Sledge*, 29 Ala. 478. If it were a matter of practical importance, there would be no room for doubt, that this statute was of force during the five years of organized government elapsing before it was in substance re-enacted by the act of 1807, Clay's Dig. 199, § 1. This was followed by the act of 1812, which subjected lands, tenements, and hereditaments, to levy and sale under execution, for the satisfaction of all judgments or decrees in courts of record; and the clerks of such courts were directed to frame the execution accordingly. Clay's Dig. 205, § 17. It seems to us, therefore, the assertion of a mere truism, that it is, and has been, the law of this State, to subject lands, equally with personal estate, to the payment of debts; and it is certainly true that, in the absence of exemption by constitutional or statutory provisions, the law appropriates to the payment of debts any and every beneficial interest of a debtor in property, real or personal, or in its use, whether the interest is legal or equitable, held jointly or in severalty. *Rugely & Harrison v. Robinson*, 10 Ala. 702. It is on the faith of this principle debts are now contracted, and not, as it is said they were in former times, on the faith of the visi-

ble chattels of the debtor. If parties are dealing fairly, the principle is in their contemplation, enters into, and forms part of the contract, as certainly as if it was expressed in terms; and it cannot be violated, without impairing the obligation of the contract. It is true, the legislature may change, alter, modify or enlarge existing remedies; or it may abolish old, and substitute new remedies. Legislative power, in this respect, is subject to the restriction that it cannot take away all remedy for the enforcement of existing contracts, nor substitute for former new remedies which impair the value and benefits of such contracts. *Gunn v. Biddle*, 8 Wheat. 82; *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; *Van Hoffman v. Quincey*, 4 Wall. 552; *White v. Hart*, 13 Wall. 646; *Walker v. Whitehead*, 16 Wall. 314; *ex parte Pollard*, 40 Ala. 77. We cannot, therefore, assent to the argument that the subjection of lands by legal process to the payment of debts is merely statutory—the consequence of statutory remedies—and that without impairing the obligation of contracts the legislature may wholly abrogate the remedy, or narrow it so that the property liable at the time the contract is made is withdrawn from its satisfaction. If the subjection of lands to the payment of debts was dependent wholly on statutory provisions, the statute having rendered them liable, it would not be competent for the legislature, by a repeal of such statutes, to remove the liability, nor to lessen it, to the prejudice of creditors whose rights had attached. The concession of such power to the legislature involves practically the power to nullify the contract, which the federal constitution interdicts.

The question of chief importance in the present case is, whether the appellant's homestead exemption is to be measured and determined by the law in force when the debts on which the judgments rendered against him, for the satisfaction of which the lands were sold under execution, were contracted, or under the subsequent statute of April 23, 1873 (Pamph. Acts of 1872–3, p. 64), which was of force when the lands were acquired by the appellant, when the judgments were rendered, and at the sale of the sheriff. In the consideration of this question, the fact that the land was acquired subsequent to the making of the contracts, and after the enactment of the latter statute, is not material. The obligation of a contract is not limited to property which the man may own when he enters into it; nor is there any intendment, or implication, that he shall be discharged when such property is exhausted. In *Sturges v. Crowninshield*, 4 Wheat. 198, it is said by Ch. J. Marshall: "It is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents,



and integrity, constitute a fund, which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation." It is only through the agency of insolvent or bankrupt laws, that future acquisitions of a debtor may be relieved from liability for precedent debts.

This fact alone distinguishes this case from numerous cases recently decided in this court, which declares that a debtor's right of exemption is dependent on the law existing when the contract is made, and that without impairing its obligation subsequent legislation cannot enlarge exemptions of his property. *Miller v. Marx*, at the last term; *Wilson v. Brown*, MSS. These decisions but follow the decisions of the Supreme Court of the United States, to which obedience is due from all State tribunals, on this and kindred questions. *Gunn v. Barry*, 15 Wall. 610; *Edwards v. Kearzy* (6 Cent. Law Journal No. 20); *Van Hoffman v. Quincey*, 4 Wall. 552; *White v. Hart*, 13 Wall. 646; *Walker v. Whitehead*, 16 Wall. 314. Before these decisions, the question may have been involved in doubt and uncertainty, by the conflicting decisions of the courts of the several States. It must now be accepted as the law, that the creditor may with confidence repose on the law as it is when he contracts, and learn from it the property which the debtor can claim as exempt, and the property he may through legal remedies condemn to its satisfaction — that while the legislature may modify, it cannot deprive him of all remedy, nor, in the regulation of remedies, invade the obligation of the contract as it was made.

When these contracts were made, the constitution of 1868 was of force, and limited the homestead to eighty acres of land, and the dwelling-house and appurtenances thereon. The exemption laws existing prior to that constitution were, as to debts contracted subsequent to its adoption, superseded by it. They operated only in reference to debts contracted prior to the constitution, not on subsequent debts. *Miller v. Marx*, *supra*. If they applied to subsequent debts, they would not avail the appellant, for they were repealed by the act of April 23, 1873, long prior to his claim of exemption and the levy and sale by the sheriff. Exemptions are statutory, or constitutional, and the law conferring them must be of force when they are claimed. A law giving them, which has been repealed, is not, and cannot be, revived by a claim under it, though it may have been of force when the contract was made. The act of April 23, 1873, enlarged the homestead exemption to one hundred and sixty acres, including the dwelling and appurtenances. It cannot, without a violation of the constitution of the United States, operate on debts contracted prior to its passage.

When the sale was made by the sheriff, there was no mode provided for ascertaining and setting apart the homestead of a judgment debtor. The statute (R. C. § 2881) applied only to the assignment of the homestead exempt under the statutes of which it was a part. It was directory in its terms, and a failure to observe them would have been mere irregularity — ground for an application to vacate the sale, but not the subject of inquiry in an action by a purchaser at a sale by the sheriff for the recovery of the lands. The purchaser could, in such action, recover only the lands which were not exempt, if, prior to the sale, the debtor had selected and claimed the homestead. In the rulings of the Circuit Court, we find no error prejudicial to the appellant.

The appellees have introduced into the bill of exemptions, taken by appellant, various exceptions reserved by them on the trial, to the rulings of the court which diminished the recovery they claimed, and, without prosecuting an appeal, have assigned errors on these rulings. There is no rule of practice which authorizes such an assignment. *Leslie v. Langham*, 40 Ala. 524; *Wright v. Evans*, 53 Ala. 103. We have not considered, and express no opinion in reference to these rulings of the Circuit Court.

The judgment is affirmed.

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### COMMONWEALTH v. LEACH

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1804

[1 Mass. 59]

An indictment for poisoning cattle is within the jurisdiction of the Court of Sessions.

The defendants were indicted in the Court of General Sessions for poisoning a cow, the property of A. B. Being convicted in that court, they appealed to this, and at the last term thereof were found guilty by the verdict of the jury. The indictment was at common law.

Bliss moved in arrest of judgment on the ground that the Court of Sessions had not jurisdiction in the case.

He said that this was a common law offense, and so laid in the indictment; that justices of the peace were officers not known to the common law, but were created by statute, and of course all their powers were given by statute; and that none of our statutes had given them jurisdiction over the offense charged in the indictment. And he cited 4 Com. Dig. Title, Just. of the Peace, B. 1, and 1 Salk. 406.

*Hooker*, for the prosecution, conceded that justices of the peace were officers created by statute, and that their jurisdiction and powers were wholly dependent upon the statutes; 2 Hawk. P. C. c. 8, § 13, &c. But he contended that their jurisdiction *here* was not limited to those offenses which are expressly, and by *name* in *our own* statutes, made cognizable by them; on the contrary, that it extended to all cases in which justices of the peace in England had jurisdiction by any of the statutes of that country, which were passed previous to the emigration of our ancestors; which were to be considered as a part of *our common law*; that this was strongly implied in the act for establishing Courts of General Sessions of the Peace, passed July 3, 1782 (*stat.* 1782, c. 14), by the *first section* of which "they are empowered to hear and determine all matters relative to the conservation of the peace, and the punishment of such offenses as are cognizable by them at *common law*, or by the acts and laws of the legislature, and to give judgment, &c. In *this* act, the term *common law* cannot mean the common law of England, because justices of the peace *there* are not common law officers; it must, therefore, mean *our common law*; and on *this* subject, *our common law* must be precisely what the *statute law* of England was at the time of the emigration of our ancestors from that country. The statutes which were previous to that time enacted in England, and which define or describe the authorities, powers, and jurisdiction of justices of the peace, give to them, expressly, cognizance of divers offenses which were offenses at common law; among which are trespasses. The present indictment is for a trespass, and, therefore, within the jurisdiction of the Sessions. 2 Hawk. c. 8, §§ 33, 38, 39; 3 Burr. 1320; *Rex v. Rispsall*, 1 Lev. 139; *Rex v. Sommers & Al.*

*Bliss*, in reply, conceded that if the *stat.* of Ed. III, which gives jurisdiction to justices of the peace in England, is adopted, and makes part of *our common law*, the objection to the indictment was unfounded; otherwise that it ought to prevail.

THACHER, J.—I am of opinion that the statutes of 1 Ed. III, c. 16, and 34 Ed. III, c. 1, respecting the jurisdiction and powers of justices of the peace have been adopted, used, and approved *here*, and are to be considered as part of *our common law*; that the offense charged in the indictment is cognizable by the Court of Sessions, and, therefore, that judgment ought not to be arrested.

SEDGWICK, J.—Justices of the peace, whether acting individually or in sessions, are creatures of statute; and their powers are given them by the statutes. 2 Hawk. 61, 8.—It appears to me, generally speaking, that the English *statutes* which were in force at the time of the emigration of our ancestors from that country,

are common law *here*. The statutes of Ed. III have been adopted and practised upon *here*, and are, therefore, to be considered as part of our common law. This is decisive of the question before the court, as the offense charged in the indictment is, by those statutes, within the jurisdiction of the Sessions.

STRONG, J.—I have no doubt upon the question. Justices of the peace have exercised this authority for a long time; certainly as far back as the memory of any of us reaches, probably much farther; which affords a strong presumption that the statutes of Ed. III have been considered as common law *here*. Usage in like points has always been taken as evidence of what is our own law — common law.

DANA, C. J.—The term *common law* ought not to be construed so strictly as is contended for by the counsel for the defendant. Generally when an *English statute* has been made in amendment of the common law of *England*, it is *here* to be considered as part of *our* common law. For instance, the statute of 7 Ja. I. c. 5, and 21 Ja. I. c. 12, giving double costs to an officer who is sued out of his county, for anything done by him in the execution of his office, being made in amendment of the common law, is adopted *here*, and is part of our common law. So also the *statute of Anne*, respecting negotiable notes. Usage of the country establishes and makes the common law of the country. No one, probably, can recollect the period when the Courts of Sessions have not exercised the authority which is now excepted against. Justices of the peace have this authority expressly given them in their commissions. It appears to me that they have uniformly exercised it, and that without being questioned; and, therefore, that the law is to be considered as settled. *Per Cur.* unanimously.

*Motion overruled.*

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## COMMONWEALTH v. CHURCHILL

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1840

[2 Metc. 118]

1. The simple repeal of a repealing statute revives the original statute.
2. The statute of 1840, c. 1, by repealing St. 1838, c. 157, revived so much of chapter 47th of the revised statutes as was repealed by the latter statute.
3. Under the provisions in the constitution of the Commonwealth, c. vi, § 6, that all laws theretofore adopted, used and approved, in the colony, province or state, and usually practised on in the courts of law, shall remain and be in full force, until altered or repealed by the legislature, it is not necessary, in order to prove that such principle or rule of the common law had been adopted, &c., to show that such principle or rule had been adjudicated before that constitution went into operation: The court rely on usage and tradition, and the

well-known repositories of legal learning — works of approved authority — to learn what are the rules of the common law; and it is to these sources, that the above provision in the constitution refers.

3. It is not necessary, in an indictment on § 2 of c. 47 of the revised statutes to aver that the quantity of liquor, alleged to have been sold by the defendant, was less than twenty-eight gallons.

4. After a conviction on an indictment charging the defendant with selling *spirituous* liquor, to be used in his house, "without being duly licensed as an innholder or common victualler," a new trial will not be granted for the purpose of allowing him to give in evidence a license, which he had omitted to produce, to sell *fermented* liquor, and thus raise a question as to the mere form of the indictment.

At the last September term of the court of common pleas, the defendant was convicted on four counts in an indictment, the first of which alleged that he, "at Stoughton in said county of Norfolk, on the 16th day of March last past did sell to one — one glass of brandy to be by him the said — then and there used, consumed and drank, in the dwelling house there situate of him the said Samuel, he the said Samuel not being then and there duly licensed, according to law, to be an innholder or common victualler; against the peace, &c., and contrary to the statute in such case made and provided." There were five other counts similar to the first, except that different kinds of spirituous liquor were alleged to have been sold to five different persons on several different days, to wit, on the 17th, 18th, 19th, 20th and 21st of March, 1840. On two of the counts the defendant was acquitted.

The defendant filed exceptions to the ruling of *Strong, J.* before whom the trial was had: "1. Because the court instructed the jury that the 2d and 3d sections of c. 47 of the revised statutes, on which the indictment is founded, are binding and valid, when the defendant contends that they are unconstitutional and void. 2. Because the court instructed the jury that those sections were still in force as law, when the defendant contends that they are repealed by subsequent legislative enactments."

*Hallett*, for the defendant, did not deny that it is a *general* principle of the common law of England, that the repeal of a repealing statute revives the preëxisting statute; but he contended that the case at bar came within the *exceptions* to this doctrine. The 2d and 3d sections of c. 47 of the revised statutes were repealed by implication, by *St.* 1838, c. 157, on the ground that new provisions on the subject were introduced into the latter statute, inconsistent with those of the former. *Commonwealth v. Kimball*, 21 Pick. 373. The fourth section of the latter statute, expressly repealing all laws inconsistent therewith, was therefore mere surplusage, for the purposes of the case at bar; as it was not necessary for the repeal of those sections of the revised statutes on which this indictment is founded. The repeal of a statute which, by making new provisions different from

those of the common law, repeals that law, does not revive the common law. *Commonwealth v. Cooley*, 10 Pick. 37. *Commonwealth v. Marshall*, 11 Pick. 350. The case of *Commonwealth v. Mott*; 21 Pick. 492, decides only that an express specific repeal of a repealing act revives the preëxisting act; not that statute, which, as in the case at bar, is repealed by implication from the provisions of another statute, is revived by a repeal of the latter.

A repealed statute does not revive by the expiration of the time to which the operation of the repealing statute is limited. *Warren v. Windle*, 3 East, 205. If, therefore, *St.* 1838, c. 157, had been limited to two years, the sections of the revised statutes on which this indictment is framed, would not have risen into force. Is there any difference between an original limitation of a statute to two years, and a repeal of it at the end of two years?

The legislature, it is well known, could not have passed an act directly reviving the *Rev. Sts.* c. 47. A majority could not have been obtained for such a measure. Hence it is to be inferred that it was not intended to revive that chapter.

By the constitution of the Commonwealth, c. vi, § 6, it is necessary that it should be shown that the principle of the common law, that a repeal of a repealing statute revives the first statute, had been adopted, used and practised on in the courts of Massachusetts before that constitution was adopted. No such usage or practice can be shown; and the principle is, therefore, not a part of our law. See *Commonwealth v. Warren*, 6 Mass. 72.

*Austin*, (Attorney-General,) for the Commonwealth. The *St.* of 1838, c. 157, repealed *Rev. Sts.* c. 47, §§ 1 and 2, not only by implication, but also expressly by the clause repealing all laws inconsistent, etc. The former statute is expressly and simply repealed, without more, by *St.* 1840, c. 1. Such repeal generally reënacts the law which was in force anterior to the statute thereby repealed. Thus *St.* 1730, c. 5, establishing the governor's salary at £1100 was repealed by *St.* 1788, c. 57, which reduced his salary to £800, but was revived by *St.* 1818, c. 88, which merely repealed the intermediate statute.

But when the first repealing statute substitutes a new system, for a limited period, or when the second repealing statute substitutes a new system, the law, which was in force anterior to both statutes, is not revived. This distinction is an answer to the cases cited by the defendant's counsel. 6 Dane Ab. 589; 2 Inst. 685; 1 Bl. Com. 90; 3 Bing. 497; 2 Dwarrris on Statutes, 675, 676; Bac. Ab. Statute, D. Palmer *v.* Moore, 9 Barn. & Cres. 754, note; *Wheeler v. Roberts*; 7 Cow. 536. [See also 1 Stephen's Com. 77.]

These are principles of the common law, by which the case is to be decided. In *Barry v. Mandell*, 10 Johns. 579, in the New York court of errors, Van Buren, senator, laid down this sound rule: "In the construction of all statutes, courts are, and ought to be, guided by the rules of construction furnished by the common law."

The provisions of the constitution respecting "laws heretofore adopted," &c., refers not to those points of law only which had been already adjudicated, but to all *systems* of law, adopted, used, &c., viz., the common law, and those parts of the canon and civil law, on which our probate systems, &c., are founded, so far as consistent with our institutions.

SHAW, C. J.—It appears by the record that the defendant was indicted for selling spirituous liquors without license, on the 16th day of March last, and at several times afterwards, and that upon a trial of the indictment, in the court of common pleas, he was convicted. Two exceptions were taken to the directions and opinion of that court in matter of law, upon which the case has been brought before this court, pursuant to the statute. These exceptions were as follows: 1. That the 2d and 3d sections of the 47th chapter of the revised statutes, upon which this prosecution is founded, are unconstitutional and void. 2. Because the court instructed the jury that these sections were in force as law, at the time when the acts charged as offenses were alleged to be done; whereas the defendant contended that they were repealed by a subsequent act of the legislature. Upon the first no argument has been offered, and it does not seem to be insisted on. The second depends upon the question, whether the statute of 1840, c. 1, passed on the 11th of February, 1840, and which went into operation in thirty days from its passage, to wit, 13th March, 1840, simply repealing the statute of 1838, c. 157, did, by its legal operation, revive the 2d and 3d sections of the 47th chapter of the revised statutes. If it did, the case of the defendant was within them; the acts all being charged to have been done after the 13th of March last, and the acts themselves being made punishable by those provisions of the revised statutes.

The *St.* of 1838, c. 157, declared that all laws inconsistent with the provisions of that act were repealed. It became necessary, therefore, to examine the preëxisting laws, to ascertain what provisions were inconsistent. Having found that, the rule was established for determining what was repealed and what remained in force. The *St.* of 1838, both in its title and enactments, was a law regulating the sale of spirituous liquors, but did not purport to make regulations for licensed houses. It has, therefore, been

determined, upon the construction of that statute, that in this respect the *St.* of 1838 was not inconsistent with the first section of *Rev. Sts.*, c. 47, and of course did not repeal it. Both could well stand together. But as it made other and different regulations upon the subject of the sale of liquors, inconsistent with the 2d and 3d sections of the same chapter, it was inconsistent with those sections, and therefore, by force of its express terms, repealed those sections. *Commonwealth v. Kimball*, 21 Pick. 373.

If the court were right in this construction, then those sections were repealed, by the express provision of the statute, as effectually as if the words of the repealing clause had expressly mentioned those two sections. It was done by using terms of description, which, when applied, have the same effect as any other terms identifying the sections or provisions to be repealed. If the court were not correct in their construction of *St.* 1838, it holding that it repealed the 2d and 3d sections of the 47th chapter of the revised statutes, then those provisions have never been repealed, because no other statute affects them; and then it follows that they have been in force ever since their enactment. Supposing they were repealed by *St.* 1838, then the question recurs, whether the simple repeal of that repealing act, making no new provisions on the subject, revives the preëxisting act.

It has not been denied that, as a general rule in the construction of statutes, the repeal of a repealing act revives the preëxisting statute. It was supposed, however, in the argument, that a different opinion was expressed in the cases of *Commonwealth v. Cooley*, 10 Pick. 37, and *Commonwealth v. Marshall*, 11 Pick. 350. In the first of these cases, it was held that *St.* 1814, c. 175, repealed the common law, by implication, by acting on the whole subject. The act of 1830, c. 57, repealed the act of 1814, but substituted a series of new provisions on the same subject. In the latter case, a doubt was expressed whether this revived the preëxisting rules of the common law. The decision of that point, however, was not necessary to the decision of the case then before the court; because although *St.* 1830 did repeal *St.* 1814, it was not a simple repeal, but again substituted other and new provisions on the same subject. But in the case now before us, there is a simple repeal, which annihilates the statute of 1838, and does nothing more. It leaves the law as it would have stood, had the act of 1838 not been passed. Of course, it revives that part of the revised statutes which had been repealed.

The case of *Warren v. Windle*, 3 East, 205, was decided upon the ground that though the new substituted provisions in a repealing act are temporary, yet the repeal itself was permanent, and therefore the preëxisting law did not revive by the expiration of the time to which the new enactments were limited.



It is conceded to be a maxim of the common law, applicable to the construction of statutes, that the simple repeal of a repealing law, not substituting other provisions in place of those repealed, revives the preëxisting law. As a maxim of the common law, it was in force here when the constitution of the Commonwealth was adopted. By that constitution, it was declared that "all the laws, which have heretofore been adopted, used and approved in the colony, province, or state of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution." This constitution has been construed as adopting the great body of the common law with those statutes made before the emigration of our ancestors, which were made in amendment of the common law, so far as these rules and principles were applicable to our condition and form of government. *Commonwealth v. Leach*, 1 Mass. 59; *Commonwealth v. Knowlton*, 2 Mass. 534.

But it was contended, at the argument, that under this provision no principle or rule of the common law could be regarded as adopted, unless it could be shown affirmatively that it had been adjudicated before the revolution. But we apprehend this would be much too narrow a construction. Before the revolution, we had no regular reports of judicial decisions; and the most familiar rules and principles of law — those which lie at the foundation of our civil and social rights — could not be so proved. No: we rely on usage and tradition, and the well known repositories of legal learning, works of approved authority, to learn what are the rules of the common law; and we have no doubt that these were the great sources to which the above pregnant provision of our constitution refers.

Taking it then as well established that the rules and maxims of the common law, referred to in the constitution, were those which our ancestors brought with them, and which had been, to some extent, modified and adapted to our condition by the legislative jurisprudence of the colonial and provincial governments, it follows that these rules and principles were regarded as binding both upon the legislators and judges in their respective departments. A part of this system are the well known rules of construction for the expounding of statutes, which are as much a part of every statute as its text. These are presumed to be known and kept in view by the legislature in framing the statute; and they must be alike regarded by judges in expounding it.

It was further insisted in the argument that the legislature could not have intended, when they repealed one license law, in

effect to reestablish another. But their intentions must be ascertained by their acts alone, and not by evidence *aliunde*. We cannot possibly know the intentions of members of the legislature: It is the will of the aggregate body, as expressed in the statutes which they pass, which can be regarded as having the force of law. Any different construction would lead to the greatest confusion and uncertainty. The legislature are presumed to understand and intend all consequences of their own measures; and the only safe course is for courts of justice to expound the intentions of the legislature by their acts, and those acts construed by known and established rules of construction.

On the whole, the court are of opinion that the simple repeal of *St.* 1838, c. 157, by that of 1840, c. 1, did revive the 2d and 3d sections of the *Rev. Sts.*, c. 47, and that the provisions of those sections were in force at the time of the offences charged in the indictment; and that the conviction was right.

*Exceptions overruled.*

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## COMMONWEALTH v. CALLAGHAN

GENERAL COURT OF VIRGINIA, 1825

[2 Va. Cas. 460]

1. A corrupt agreement between two justices of the peace, A. and B. to the following effect: that A. will vote for C. as Commissioner of the Revenue, in consideration, that B. will vote for D. as Clerk; and that B. will vote for D. as Clerk, in consideration that A. will vote for C. as Commissioner of the Revenue, and the actual voting of the said two Justices, in pursuance of said corrupt agreement, is not an offence within the Statute, against buying and selling offices, because the corrupt bargains and sales, prohibited by that Statute, are those by which the party bargaining or selling it is to receive some profit or some assurance of profit directly or indirectly to himself.

2. But such a corrupt agreement, (and the execution of it) is a misdemeanor at Common Law, for which an Information or Indictment will lie.

This was a Case adjourned by the Superior Court of Law of Alleghany county. The Case itself is fully set forth in the following opinion of the General Court, delivered by BARBOUR, J.

This is an adjourned Case from the Superior Court of Law for the county of Alleghany.

It was an Information filed against *Callaghan* and *Holloway*, two of the Justices of Alleghany, alleging in substance the following charge: that at a Court held for the county of Alleghany, there was an election for the office of Commissioner of the Revenue, and of Clerk of said Court, when the Defendants were both present, and acting in their official character as Magistrates, in voting in

said election; that the Defendant *Callaghan*, in said election for Commissioner of the Revenue, wickedly and corruptly agreed to vote, and, in pursuance of said corrupt agreement, did vote for a certain *W. G. Holloway*, to be said Commissioner; in consideration of the promise of the Defendant *Holloway*, that he would vote for a certain *Oliver Callaghan* to be Clerk of said Court; and that the Defendant *Holloway* in the said election of Clerk, wickedly and corruptly agreed to vote, and in pursuance of said corrupt agreement, did vote for a certain *Oliver Callaghan* to be said Clerk, in consideration of the promise of the Defendant *Callaghan*, that he would vote for the aforesaid *W. G. Holloway*, to be Commissioner. To this Information, the Defendants demurred generally, and there was a joinder in the demurrer. The Superior Court of Law of Alleghany, with the assent of the Defendants, adjourned for novelty and difficulty, to this Court, the questions of Law arising upon the demurrer to the Information, and particularly the following, viz:

1. Is there any offence stated in said Information, for which an Information or Indictment will lie?

2. Is the offence charged in the said Information, within the true intent and meaning of the Act of the General Assembly, entitled "An Act against buying and selling offices," passed October 19th, 1792, in page 559, 1st vol. *Rev. Code* of 1819?

3. If the offence be within the said Act, is the Information filed in this Case, a good and sufficient Information?

The first and second questions, for the sake of convenience, will be considered together.

It is proper to premise, that a general demurrer admits the truth of all facts which are well pleaded; there being such a demurrer in this Case, and the Information distinctly alleging that the defendants, in giving their votes respectively, acted wickedly and corruptly, such wicked and corrupt motive will be considered throughout, as forming a part of the Case.

The Court are unanimously of opinion, that the Case as stated in the Information, is not within the true intent and meaning of the Act of Assembly, referred to in the second question. The Act embraces two descriptions of Cases. 1. The sale of an office, or the deputation of an office; 2. The giving a vote in appointing to an office, or the deputation of office. It would be within the latter description that this Case would fall, if within either; but the Court are decidedly of opinion, that this Case does not fall within this description, because the plain construction of the Statute is, that the penalties which it denounces, are incurred only by those, who receive or take, either directly or indirectly, any money, profit, &c., or the promise to have any money, profit, &c., to *their own use, or for their own benefit*. In this case,

it appears from the Information, that the promise of each of the Defendants to the other, which constituted the consideration of the vote of that other, and the vote given in consequence of such promise, enured, not to the benefit of the Defendants or either of them, but to the benefit of others. If indeed, it had been alleged in the Information, that the persons for whom the votes were given, were, if elected, to have held them, upon any agreement, that the Defendants should, in any degree, participate in their profits, or receive from the holders of them, any benefit or advantage, the case would have been different, for then the Defendants would have received a profit *indirectly*, and thus would have fallen within the Statute; but there is no such allegation.

The Court being thus of opinion, that this Case was not embraced by the Statute: but at the same time considering, that that system of Criminal Jurisprudence, must be essentially defective, which had provided no punishment for acts such as are charged in the Information, and which merit the reprehension of all good men, were led to enquire, whether the acts charged in the Information, did not constitute an offence at Common Law; and they are of the opinion that they do.

In relation to those offences, which rise to the grade of Felony, there is usually, particularly in the designation of them by name, an accuracy in the definition; as for example, Murder, burglary, Arson, &c., in each of which, the term *ex vi termini*, imports the constituent of the offence; but in the general classification of crimes, whatever is not Felony is Misdemeanor. In relation to these, then, they are not only numerous, but indefinitely diversified, comprehending every act which, whilst it falls below the grade of felony, is either the omission of something commanded, or the commission of something prohibited by Law. As to these, the Law can do no more than lay down general principles; and it belongs to the Courts of the country, to apply those principles to the particular cases as they occur, and to decide whether they are, or are not, embraced by them. Thus the Law, as a general proposition, prohibits the doing of any act, which is *contra bonos mores*. The particular acts which come up to this description, it is impossible to include in any precise enumeration; they must be decided as they occur, by applying this principle to them as a standard. Thus again, it is now established as a principle, that the incitement to commit a crime, is itself criminal, under some circumstances. 6 East, 464; 2 East, 5. As for example, the mere attempt to stifle evidence, though the persuasion should not succeed. Cases of this kind may be as various, as the varying combinations of circumstances.

To come more immediately to the present Case, we hold it to be a sound doctrine, that the acceptance of every office, implies the

tacit agreement on the part of the incumbent, that he will execute its duties *with diligence and fidelity*. 5 Bac. Abr. 210, Offices and Officers Let. M. We hold it to be an equally sound doctrine, that all officers are punishable for corruption and oppressive proceedings, according to the nature and heinousness of the offence, either by Indictment, Attachment, Action at the suit of the party grieved, loss of their offices, &c. 5 Bac. Abr. 212, Letter N.

And further, that all wilful breaches of the duty of an office, are forfeitures of it, and also punishable by fine, (Co. Litt. 233, 234,) because every Office is instituted, not for the sake of the officer, but for the good of another or others: and therefore, he who neglects or refuses to answer the end for which his office was ordained, should give way to others, and be punished for his neglect or oppressive execution.

Let us apply these principles to the present Case. The Defendants were Justices of the Peace, and as such, held an office of high trust and confidence: in that character, they were called upon to vote for others, for offices, also implying trust and confidence: Their duty required them to vote in reference only to the merit and qualifications of the officers; and yet upon the pleadings in this Case, it appears, that they wickedly and corruptly violated their duty, and betrayed the confidence reposed in them, by voting under the influence of a corrupt bargain, or reciprocal promise, by which they had come under a reciprocal obligation to vote respectively for a particular person, no matter how inferior the qualifications to their competitors. It would seem, then, upon these general principles, that the offence in the Information is indictable at Common Law. But, there are authorities which apply particularly to the case of Justices. In 1 Bl. Com. 354, n. 17, Christian; it is said, if a Magistrate abuse his authority from corrupt motives, he is punishable criminally by Indictment or Information.

Again, where Magistrates have acted partially, maliciously or corruptly, they are liable to an Indictment. 1 Term Rep. 692; 1 Burr. 556; 3 Burr. 1317, 1716, 1786; 1 Wils. 7. An instance of their acting partially, is that of their refusing a license from motives of partiality, the form of the Indictment for which is given in 2 Chitty's Crim. Law, 253.

We are then of opinion, for the reasons, and upon the authorities aforesaid, that the offence stated in the Information is a misdemeanor at Common Law, for which an Information will lie, but that is not within the Statute referred to.

In answer to the 3d question, we are of opinion, that the Information is a good and sufficient one.

All which is ordered to be certified to the Superior Court of Law for Alleghany county.

## ANDERSON v. COMMONWEALTH

GENERAL COURT OF VIRGINIA, 1826

[5 Rand. 627, 16 Am. Dec. 776]

1. Before the statute of *circumspecte agatis*, 13 Edw. 1, the Court of King's Bench punished offences of inconsistency, but since that statute, the cognizance of such offences has been transferred to the Ecclesiastical Courts.

2. The offences of adultery, fornication, and the like, cannot be punished by our Courts of Law, as *common law offences*, unless they be accompanied with other circumstances, which of themselves constitute a misdemeanor; such as the public commission of the act, or a conspiracy. The statutory offence must be punished according to the statute.

3. The seduction and abduction of a female *over* sixteen years of age (being not within the statute,) cannot be punished by indictment. It would have been otherwise, if a conspiracy had been charged.

4. Although our Courts take cognizance of offences *contra bonos mores*, yet the adjudicated cases afford a safe rule for fixing the limits of the principle: if they are departed from, the criminal jurisdiction may be extended to cases, which, though grossly immoral, were never yet thought of as indictable offences; such as slander and the like.

This was a writ of error to a judgment of the Superior Court of Law for Chesterfield county, rendered against the plaintiff in error, by which he was sentenced to imprisonment in the jail of the county, without bail or mainprize for the space of two years and six months, and afterwards till he should make his fine with the Governor, by the payment of one thousand dollars, the fine assessed by the jury, or until he be discharged by due course of law.

The indictment against the plaintiff in error contained two counts, the first of which charged that he, being a married man, on the 22d November, 1825, in the said county of Chesterfield, one *Elizabeth F. Hargrove*, a maiden, and unmarried, and under the age of twenty-one years, that is to say, of the age of sixteen years, two months and nineteen days, having no father living, and being then and there under the care and custody of *Elizabeth Hargrove*, a widow, her mother, did entice, inveigle, take and carry away from the care and custody of her said mother, for the purpose of prostituting and carnally knowing her the said *Elizabeth F.* against the peace and dignity of the Commonwealth. The second count in like manner charges him with the enticing, inveigling, taking and carrying away the said infant over the age of sixteen years, and moreover charges that he did, on a subsequent day, deflour, carnally know, and prostitute her, the said *Elizabeth F. Hargrove*, against the peace and dignity of the Commonwealth.

Our statute, like the statute of Philip and Mary, punishes by imprisonment, without bail or mainprize, the person who unlaw-

fully takes and carries away any maiden, or woman child, being *within the age of sixteen years*, from the possession, and against the will of her father, mother, or other person having the custody of such maiden: and the punishment is greatly increased if the maid be deflowered. I Revised Code of 1819, chap. 106, secs. 25 and 26. The maiden in this case being more than sixteen, the offence was not within the statute; and the question was, whether it was punishable by indictment at common law.

A writ of error was awarded at the June term, and the Court now proceeded to judgment.

DADE, J., delivered the opinion of the Court.

The question is, whether the offence of which the plaintiff has been convicted, and had judgment, is a misdemeanor, punishable by indictment at the common law?

The class of misdemeanors within which it is insisted this offence is comprehended, is that of offenses *contra bonos mores*, over which the Court of King's Bench in England, and the Superior Courts of Law of this Commonwealth have always claimed to have jurisdiction. It is admitted, that before the statute of *circumspecte agatis*, 13 Edward I, the Court of King's Bench, did on this principle punish the offences of incontinency, and that by that statute the jurisdiction was transferred to the Ecclesiastical Courts. It may be well doubted whether the King's Bench before the statute or the Courts Christian since, looked beyond the simple fact of incontinence, as that offence is at present contemplated and punished by our own acts of Assembly. In other words, whether they looked beyond the mere offence of incontinence, as consisting in the single act of cohabitation between persons of different sexes, without the rites of marriage, not varied by any fraud, deception, or inveiglement which may have been practised by the man. But, after the statute of *circumspecte agatis*, the Court of King's Bench did not exercise jurisdiction in punishing the mere act of incontinence. It, however, retained its general power of punishing offences *contra bonos mores*, and it is presumed might have punished an offence of incontinence combined with circumstances, which, beyond the mere criminality of the simple fact, were calculated to make it injurious to society; as, in case of incontinence in a street or highway. But, in such cases the jurisdiction would not spring from the criminal character of the simple fact, but from its publicity; as, there are many cases where an act, which is not criminal in private, becomes penal by the publicity which attends its perpetration. The act of *Sir Charles Sedley*, in running naked through the streets, derived its whole criminality from its publicity. It is not, therefore, in this case allowable to connect the criminality of the

mere act of incontinence, which as such, is punishable in a certain mode prescribed by the statute, with the particular circumstances of fraud and deception, and the special injury to the female, so as to make the supposed common law offence, (as the courts might entertain it in England, since the statute of *circumspecte agatis*,) derive support, or even acquire being from the statutory offence. If the statutory misdemeanor of simple incontinence is to be punished, it must be according to the statute. If there be other circumstances in the case which entitle the Common Law Courts to jurisdiction, those circumstances must of themselves constitute a misdemeanor. By these principles, the only two reported cases in the English books are to be tested. The case of the *King v. Lord Grey and others*, 9 State Trial (Cobbet's edition,) pa. 127, was that of an information, alleging a *conspiracy* to take away, and debauch a maiden over the age of sixteen, and under twenty-one, and an accomplishment of the act by those means. This conspiracy is emphatically charged in the information, and as it was to do a wrongful act, for which certainly, if done, an action lay to the father of the maid, the conspiracy, if proved, clearly amounted to a common law misdemeanor. So, in the case of *Sir Francis Blake Delaval and others*, 3 Burr. 1432, which was "a motion for an information against the defendants for a *conspiracy* to put a young girl into the hands of a gentleman of rank and fortune, for the purpose of prostitution," although Lord Mansfield, in allowing the motion, intimates an opinion that the Court of King's Bench might have jurisdiction of the case, as one *contra bonos mores*, yet he decides it on the ground that there was in that case, "a conspiracy and confederacy;" which, says he, "are clearly and indisputably within the proper jurisdiction of this court." Without doubt in these cases, the Court having jurisdiction of them, on undeniable common law principles, the punishment in case of conviction, might well be aggravated by the baseness, perfidy, or malignity, which was the motive and end of the conspiracy. In like manner, as in trespass, circumstances may aggravate the damages, which would not of themselves alone support the action. But clearly, neither of these cases does maintain the position, that as a common law misdemeanor, an indictment or information will lie, either for simple incontinence, or for incontinence produced by means of deception, inveiglement, or enticement, in other words, by seduction.

It is too late now to assume jurisdiction over a new class of cases, under the idea of their being *contra bonos mores*. We must consider the practice of the English Courts, from which we derive the principle, as having settled in the course of many centuries, the true limits and proper subjects of this principle. If we are



to disregard these land marks, and take up any case which may arise under this principle, as *res integra*, then might it be extended to cases which none has yet thought of as penal. A case of slander may display as much baseness and malignity of purpose, as much falsehood in its perpetration, as ruinous effects in its consequences, and as pernicious an example in its dissemination, as this case of seduction. And yet none would think of prosecuting it criminally. It is true, that if something peculiar in our situation had given rise to a class of cases *contra bonos mores*, as in regard to our slaves, which could not have existed in England, we might be justified in applying the rule in the absence of all precedent. But, in relation to seduction, no such supposition can be made, as we know from the books of reports that many such cases have occurred there. And we even see that in two cases, it was in fact the prominent feature, and yet the jurisdiction in one of them was made to hang on another hinge; and in the other, which was never decided, was certainly fortified by the allegation and proof of a common law misdemeanor.

From these premises, it would seem to be proper to infer that since the statute of *circumspecte agatis*, in England, the Common Law Courts have never taken jurisdiction of the mere offence of incontinence, nor of any offence of incontinence combined with other reprehensible circumstances, not in themselves importing a common law misdemeanor; that in this country the Legislature has taken up the subject of simple fornication and adultery, and has defined a precise mode of proof, and a fixed and certain punishment: that there is no reason to believe, that these statutes are cumulative; but, that they occupy the whole ground; and that, as in England, the offence being merely spiritual, is not, under any circumstances, allowed to be the foundation of a criminal prosecution in the Courts of Common Law; so here, by parity of reasoning, the offence being entirely statutory, it shall not be converted into the foundation of a common law misdemeanor.

If these premises and deductions be true, we must throw out of this case the statutory criminality of the mere act of incontinence, and then we cannot support the indictment, unless the other circumstances amount to a common law misdemeanor. If they had made out a case of conspiracy, the *desideratum* would have been supplied. But, it is not found in the artifices and contrivances, which may have been used in alluring the female from the path of virtue, and the home of her parent.

For these reasons, the court is of opinion, that the judgment of the Superior Court of Chesterfield be reversed, and this Court proceeding to give such judgment as the said Superior Court ought to have rendered, it is further considered that of the offence of

which the said Samuel Anderson hath been indicted, and convicted, he be acquitted and discharged, and that he go thereof without day.

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## COMMONWEALTH v. COOLEY

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1826

[10 Pick. 36]

1. An indictment for disinterring a dead body, alleged that the burying ground in G., where the body was interred, *belonged to the first congregational parish in G.* Held, that this allegation was unnecessary, and that it did not become material by being inserted in the indictment, and therefore need not be proved.

2. The common law, in relation to the offence of disinterring a dead body, is superseded by St. 1814, c. 175; so that an indictment for this offence must conclude *contra formam statuti*.

This was an indictment for disinterring the body of one Chase, which was alleged to have been interred in "the common burying ground in Greenfield, belonging to the first congregational parish in said Greenfield." The crime was alleged to have been committed in 1824, and was set forth as an offence at common law, the indictment not including *contra formam statuti*.

At the trial, before Morton, J., the defendant objected that no evidence had been introduced on the part of the Commonwealth, to prove the allegation that the burying ground belonged to the first congregational parish; but the jury were instructed that this allegation was immaterial and need not be proved. The defendant being found guilty, he excepted to this instruction.

The defendant also moved in arrest of judgment, because the indictment was brought at common law and not upon St. 1814, c. 175.

*Bates*, for the defendant. The allegation that the burying ground belonged to the first congregational parish, is a material part of the description of the offence, and should have been supported by evidence. But if it is not essential, still as it is inserted in the indictment, it must be proved. *United States v. Porter*, 3 Day, 283; *Bristow v. Wright*, Doug. 665.

The disinterring of a dead body is not an offence at common law. The first case of a prosecution for it in England, is that of *Rex v. Lynn*, 2 T. R. 733; and in our reports there is no adjudication before the enactment of St. 1814, c. 175.

But admitting it to be otherwise, the common law is superseded by that statute. *Bartlett v. King*, 12 Mass. R. 545; *Ellis v. Paige*,

1 Pick. 45; *Commonwealth v. Chapin*, 5 Pick. 199; *Nichols v. Squire*, *ibid.* 168; 6 Dane's Abr. 589, c. 196, art. 1, § 20. The statute is not cumulative, for it does not give a more summary remedy than the common law, nor inflict an additional penalty. 1 Kent's Com. 436; *Regina v. Wigg*, 2 Salk. 460; *Rex v. Robinson*, 2 Burr. 799.

The common law being no longer in force, the prosecution cannot be sustained, because it was not commenced within two years next after the offence was committed; *St.* 1788, c. 12, § 1; and because the indictment does not conclude *contra formam statuti*.

*R. E. Newcomb*, for the Commonwealth, cited to the point, that disinterring a dead body was an offence at common law, 1 Russell on Crimes, 606; 1 Hale's P. C. 515; 7 Dane's Abr. 257, c. 218, art. 2, § 20.

The statute of 1814 has not repealed the common law, either expressly or by necessary implication. It does not create a new offence; it limits and modifies the punishment. Affirmative words in a statute, without negative words, do not annul the common law. *Jenk. Cent.* 212. The words *contra formam statuti* are not necessary in an indictment, where the offence is by common law and the statute only adds a penalty. *Burgen's case*, 1 Ventr. 13; 2 Hawk. P. C., c. 25, § 4, note 2; *Rex v. Balme*, Cowp. 648; 1 Chit. Cr. Law, 238; *Knight's case*, 3 Mod. 118; *Rex v. Robinson*, 2 Burr. 805; *Com. Dig. Indictment, D*; *Regina v. Wigg*, 2 Salk. 460; *Rex v. Smith*, 2 Doug. 441; *Commonwealth v. Searle*, 2 Binney, 332; *Commonwealth v. Hoxey*, 16 Mass. R. 387.

The *St.* 1788, c. 12, limiting prosecutions on penal statutes, does not affect the statute of 1814. This statute prescribes, that on conviction of the offences therein mentioned, in the Supreme Judicial Court, the offender may be imprisoned not more than one year or fined more than \$1,000, and "all fines accruing under this act shall enure, one half to the informer, and one half to the town in which the offence is committed." This is not a penal statute within the meaning of the statute of 1788. No prosecution can be maintained under the statute of 1814, by a common informer, the only remedy is by indictment. It is believed that no other statute of this Commonwealth can be found, that prescribes any other punishment than a pecuniary penalty, where a part of the penalty goes to the informer.

The allegation that the burying ground belonged to the first congregational parish in Greenfield, is immaterial and may be rejected as surplusage. *Com. Dig. Indictment, G*; *Walker's case*, 4 Co. 41a; *Long's case*, 5 Co. 121b; *Commonwealth v. Hunt*, 4

Pick. 252; 3 Stark. Ev. 1534, 1535; 1 Phil. Ev. (N. York ed.) 150.

*Davis*, Solicitor-General, on the same side.

*Per Curiam.* The indictment having alleged that the burying ground belonged to the first congregational parish in Greenfield, it is objected that no evidence was offered on the part of the government in support of the allegation. The Court are of opinion, that the allegation was unnecessary, and that it did not become material by having been introduced into the indictment. It forms no part of the description of the offense charged. It does not qualify or aggravate the offense. There is therefore no reason for granting a new trial.

But the defendant moves in arrest of judgment, that the crime for which he is indicted is not an offence at common law; and if it is, that the common law on this subject has been superseded by our statute of 1814, c. 175. We think it clear that it is an offence at common law, and there is an express decision to that effect in 2 T. R. 733. The reason why cases of this sort are not to be found in the earlier reports is very obvious, namely, that the dissection of human bodies was not so extensively practised in former times. And this will account for the fact, that few, if any prosecutions at common law for this offence, have taken place in this Commonwealth.

The question then is, whether the common law has been superseded here by the statute of 1814. And the Court are of opinion that it has been. The whole subject has been revised by the legislature. The time for prosecuting the offence, and the punishment are limited by the statute, and provision likewise is made for the removal of dead bodies. A statute is impliedly repealed by a subsequent one revising the whole subject matter of the first; *Bartlett v. King*, 12 Mass. R. 545; *Nichols v. Squire*, 5 Pick. 168; and in the case of a statute revising the common law, the implication is at least equally strong. At common law it was criminal to dig up and remove a dead body; but that would not now be an offence in this Commonwealth, since the statute makes provision for the removal of a dead body under a license. If the common law were in force, it should seem that the license would not be a defense to an indictment at common law. The common law and the statute would be at variance with each other.

*Judgment arrested.*

## JENNINGS v. COMMONWEALTH

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1835

[17 Pick. 80]

1. The keeping a house of ill fame for lucre, is an offence at common law; and the common law in relation to it is not repealed by *St.* 1793, c. 59, § 8, which provides, that "for the prevention of poverty as well as lewdness, any person suspected of such offence may be apprehended by warrant from a justice of the peace upon the complaint of the overseers of the poor, and upon conviction before such justice, &c., may be ordered to the house of correction for a month, and shall not afterward be allowed to keep boarders without the license of the overseers. (See Revised Stat. c. 130, § 8.)

2. Where upon an indictment, a general verdict of guilty is returned, and one count in the indictment is good and sufficient to warrant the judgment given, it is not a cause for reversing the judgment on error, that there is another count, which is defective.

This was an indictment containing two counts, the first of which set forth, that Jennings, on January 1, 1830, and on divers days and times between that day and the finding of the indictment, kept a house of ill fame, at Warwick, for the sake of lucre, whereby divers unlawful assemblies, riots, violations of the peace of the Commonwealth, and lewd offences, in the same house, at such times, as well in the night as in the day, were committed, to the great damage and common nuisance of all the citizens of the Commonwealth, against good morals, and against the peace and dignity of the Commonwealth. The second count was similar, except that the allegation, that he kept the house for lucre, was omitted.

At the trial in the Court of Common Pleas, Jennings was found guilty, and was sentenced to imprisonment for eight months.

Subsequently a writ of error was brought by Jennings, in this Court, and the following errors among others were assigned:

1. That the indictment and the matters therein, were bad and insufficient in law to support the judgment.

2. That although the offence therein described, was not now an offence at common law, but by statute only, yet the indictment did not conclude *contra formam statuti*, nor in any way allege or take notice of the statute.

3. That the punishment of Jennings was other and greater than that prescribed by *St.* 1793, c. 59 § 8, and was contrary to law.

4. That the second count in the indictment did not allege any offence at common law, and yet did not take notice of any statute.

*Wells* and *Alvord*, for the plaintiff in error. The common law in regard to this offence, has, by necessary implication, been repealed by the *St.* 1793, c. 59, § 8, and therefore this indictment,

which is at common law, cannot be sustained. *Bartlett v. King*, 12 Mass. R. 545; *Nichols v. Squire*, 5 Pick. 168; *Commonwealth v. Cooley*, 10 Pick. 39. By the statute the mode of proceeding in such cases, is modified so that a person charged with this offence, instead of being liable to an indictment only, may be prosecuted upon the complaint of the overseers of the poor, and be tried before a justice of the peace. But what is more important, is the change made in regard to the punishment. By the common law this offence was punishable not only with fine and imprisonment, but also with such infamous punishment, as the court should deem proper; 5 Bac. Abr. *Nuisance, D*; but by the statute it is punishable by confinement in the house of correction for one month, and disqualification to keep boarders without a license from the overseers; so that two persons guilty of the same offence may, in case the common law is held to continue in force, be subjected to different and disproportionate punishments, according to the caprice of the prosecuting officer.

*Austin* (Attorney-General) and *Dewey* (District Attorney), for the Commonwealth, to the point, that the facts set forth in this indictment constituted an offence at common law, cited 2 Hawk. P. C. c. 74; and to the point, that where one of the counts is defective, the judgment will be deemed to have been rendered on the good count, *Grant v. Astle*, 1 Doug. 730; *People v. Curling*, 1 Johns. R. 320; *Kane v. People*, 3 Wendell, 363.

SHAW, C. J., delivered the opinion of the Court. In the first place, there is no doubt the offence charged in this indictment is an offence at common law.

It is then contended, that the common law upon this subject is repealed. It is admitted that there has been no repeal in terms, but it is insisted, that it has been repealed by implication, by a statute provision on the same subject, which necessarily repeals it by implication. *St.* 1793, c. 59, § 8. It is remarkable, that this question has not arisen before, it having been the practice, it is believed, ever since the passing of the statute, to indict for this offence at common law, and a form is given in *Davis's Precedents*, from which it is said the form in this case was taken. But perhaps the point has never before been suggested.

In *Commonwealth v. Cooley*, 10 Pick. 37, it was held, that where a statute has revised the whole subject, made that a qualified offence which was one absolutely before, and limited the time for prosecution and the degree of punishment, and where the same purpose is to be accomplished, that of restraining the offence by *punishment*, the statute must be deemed a constructive repeal of the common law, because such must be presumed to have been the intent of the legislature. But unless such intent is manifest,

the repeal by implication cannot be inferred. And in applying that rule to the present case, upon a consideration of the statute, we think it furnishes no reasonable presumption, that it was intended to repeal the common law. The object and purpose of the statute seems to be different, in some respects, from that of the common law, and made *alio intuitu*. The provision is not only found in a statute made for the general purpose of relieving the poor and preventing pauperism, but the enactment in question is introduced by a preamble, setting forth the purpose, to *prevent* poverty as well as lewdness, and then goes on to provide a summary mode of breaking up houses of prostitution. The keeper is to be *ordered* for a short period to the house of correction, and forever disabled from keeping lodgers or boarders, without a special license. If the purpose is punishment, it is not the sole, and perhaps it may be reasonably inferred, not the leading purpose.

When a statute is made giving a new remedy, &c., either remedy may be pursued. At common law, keeping swine in the city of London was a nuisance, and of course indictable. By the statute, the hogs were liable to be seized, &c.; but it was held, that notwithstanding this statute, the offence was still indictable at common law. It was cumulative and not a substitute. *Regina v. Wigg*, 2 Salk. 460.

This case is distinguishable from *Commonwealth v. Cooley*, in several particulars. That indictment simply alleged the taking up dead bodies. But that had ceased, by force of the provisions of the statute, to be an offence of itself, and after the statute, taking up dead bodies under certain circumstances, as for instance by license, was made lawful. The common law therefore by which it was before unlawful, was in fact repealed. Besides, the sole purpose of both was punishment of the offenders.

2. As to the second objection, without a particular examination of the precedents or authorities to see whether the allegation, that the house was kept for lucre, is material, the Court are of opinion, that if one count in the indictment is good, which is sufficient to warrant the judgment given, and there is a general verdict of *guilty*, it is no cause of error that there is another defective count. The judgment and sentence will be considered as having been given according to the offence well charged and proved. *Regina v. Ingram*, 1 Salk. 384; *Grant v. Astle*, 2 Doug. 730; *People v. Curling*, 1 Johns. R. 320; *Kane v. People*, 3 Wend. 365. In this case, one count in the indictment is clearly good and sufficient in law to warrant the judgment; and whether the other is bad or not, it is no cause for reversing the judgment on error.

*Judgment approved.*

## ESTES v. CARTER

SUPREME COURT OF IOWA, 1860

[10 Iowa 400]

1. Sodomy is not a crime under the laws of this State, and words charging the commission of that vice are not actionable *per se*.

2. While the principles of the common law, applying to criminal procedure and the definition of crimes, are recognized by the courts of this State, no common law offense, not recognized by the criminal statutes of the State, will be treated or punished as a crime by the courts.

*Appeal from Keokuk District Court*

The facts are sufficiently stated in the opinion.

*J. M. Casey* and *C. H. Mackey*, for the appellant, cited *The United States v. Hudson & Goodwin*, 7 Cranch., 32; *Brooker v. Coffin*, 5 John., 188; *Burton v. Burton*, 3 G. Greene, 316; *Abrams v. Foshee, et ux.*, 3 Iowa, 274.

*Hendershott & Burton*, for the appellee, cited Whart. Cr. L., 81, authorities there cited; 1 Russ. on Cr. 49; *The State v. Jesse*, 1 Gill. & John., 290; *Turnpike Road v. The People*, 15 Wend., 267; *Commonwealth v. Sickie*, 1 Brightly, 69; *Commonwealth v. Holmes*, 17 Mass., 335; *Commonwealth v. Morse*, 2 Ib., 139; *The People v. White*, 22 Wend., 167; *O'Ferrall v. Simplot*, 4 Iowa, 381; *Arnold v. Cost*, 3 Gill. & Johns., 219; *Linville v. Earlywine*, 4 Blackf., 469; *Stout v. Wood*, 1 Ib., 71.

LOWE, C. J.—This was an action of slander, for charging the plaintiff with having committed the crime of *sodomy*. No special damages being laid in the petition for uttering and publishing the slanderous words, a demurrer was filed to the effect, that the words complained of imputed no crime which was indictable under the criminal laws of this State, and were therefore not actionable *per se*. The demurrer was overruled and the question brought up to this court for revision. Sodomy is no crime under the laws of this State. If it is not an indictable offense at common law, in this State, the demurrer was properly overruled; otherwise it should have been sustained. This presents the question, not before raised in this Court; that we are aware of, whether the courts of this State may take cognizance of and punish offenses at common law, which are not included and specified by name in our Criminal Code. The statute does not expressly adopt or repeal the common law in this State; yet its principles are recognized in the Code, as well as by our courts, and are made the rules of decision both in civil and criminal cases. Indeed it



would be a most difficult matter to administer criminal justice under our Code of procedure without the aid of common law, in the light of which statutory crimes are to be interpreted, and their definitions, if defective, to be expounded and explained. Whilst, therefore, the principles of the common law do enter into all our criminal adjudications when the jurisdiction of our courts over criminal offenses has been established by law, still they do not confer upon the courts in this State the power to try and punish an offense that is such at common law, but which has not been ordained as such by the supreme law making power of the State. Art. 5, section 6 of the Constitution declares, that the District Courts of this State shall have jurisdiction in civil and criminal matters arising in their respective districts in such manner as shall be prescribed by law. The mode thus prescribed is contained in our Code of criminal procedure, and is limited, we think, to the prosecution and punishment of the offenses therein enumerated. This is inferable from the powers and duties of the grand jury and the court, therein expressed. Besides, the statutory offenses so nearly cover all the common law offenses, that it is reasonable to infer that those which are omitted were intended to be excluded. In many of the states the common law is in full force as to its provisions for the punishment of crime. In several others it has been expressly repealed so far as the trial and punishment of offenses are concerned. In Ohio the common law has not been either expressly adopted or repealed, and whilst its principles have been recognized as rules of decision in both civil and criminal adjudications, yet her courts have held that offenses could not be prosecuted and punished under its provisions alone.

In this State the mode of punishing the crime of sodomy is not prescribed by law, and in the absence of such statutory authority the court can exercise no such power. The demurrer in this case should have been sustained, and the cause dismissed. 1 Bish. Crim. Law, 15, 16, 45, 46; 1 Ohio R., 132; 11 Ohio 404; 6 Ohio, 435, 438; 4 Iowa, 274.

*Judgment reversed.*

## STATE OF MINNESOTA v. PULLE

SUPREME COURT OF MINNESOTA, 1866

[12 Minn. 164]

1. The common law as to crime is in force in this state, except where abrogated or modified by statute.

2. The gist of the crime of conspiracy is the unlawful confederation. No overt act in pursuance of it need be proved.

Certified up from the district court, Ramsey county.

The defendant, with many others, was indicted for conspiracy to commit an assault. He demurred to the complaint, on the grounds substantially—

(1) There is no statute of this state creating, defining, or punishing conspiracy as a crime.

(2) There are no common-law offences in this state.

(3) No act pursuant to the conspiracy is charged.

The demurrer was overruled.

*Gorman & Davis*, for appellant.

*S. M. Flint and Jas. Gilfillan*, for respondent.

WILSON, C. J.—The common law, so far as it is applicable to our situation and government, is, as a general rule, the law of this country. Every state, with perhaps one exception, has adopted it, either tacitly or by express statutory enactment. See 1 Kent Comm. 470–3, note and cases in note. That it is the law of this state, controlling both the rights and the remedies of parties in actions between individuals, either on a contract or for a tort, cannot be doubted, for the courts have recognized and acted on this fact ever since the organization of our territorial government; and we find no evidence which satisfies us that either the state or territory intended to repudiate the common law as a source of jurisdiction in either criminal or civil cases. It having been adopted in civil cases, the presumption certainly is that it was adopted as an entirety, so far as it is not inconsistent with our circumstances, or statutory or constitutional law. Nor do the laws in force in Wisconsin territory at the date of the admission of the state of Wisconsin (which, by our organic act, were declared to be valid and operative in Minnesota territory) rebut this presumption. There is nothing in these laws which shows that the territory of Wisconsin abrogated or repealed the common law as to crimes; but, on the contrary, we think they show that it was recognized and adopted in that territory. That our statutes expressly abolish common law offences is not pretended. A statute

which is clearly repugnant to the common law must be held as repealing it, for the last expression of the legislative will must prevail. Or we may admit, for the purposes of this case, that when a new statute covers the whole ground occupied by a previous one, or by the common law, it repeals, by implication, the prior law, though there is no repugnancy. Beyond this the authorities do not go in sustaining a repeal of the common law by implication. On the contrary, it is well settled that where a statute does not especially repeal or cover the whole ground occupied by the common law, it repeals it only when and so far as directly and irreconcilably opposed in terms. See 1 Bish. Crim. Law (3d Ed.), §§ 195 to 200, and cases cited in notes to said sections.

Our statutes fall far short of covering the whole field of common law crimes. It is not pretended that conspiracy is by them made a crime, and we think it very clear that libel is not, and many other instances might be added. We think, therefore, that they do not, by implication, abolish these crimes. But, further than this, we think our statutes clearly recognize the existence of common law offences. Section 2, c. 87, Comp. St., reads as follows: \* \* \* "Crimes and public offenses and criminal proceedings are modified as prescribed in these statutes." The Revised Statutes were adopted in 1851, and the language above quoted was added as an amendment in 1852. It is, perhaps, true that this amendment did not change the meaning of the statutes, but legislators frequently and properly make use of language which, strictly speaking, is unnecessary, out of abundant caution, and for the purpose of making clear what otherwise might, in the minds of some, admit of doubt. We think, in this view, the legislature must have used the language above quoted to show that our statutes as to crimes were intended merely as a *modification*, and not as an entire repeal or abrogation, of the common law. This seems to us the fair and natural meaning of the language, and any other construction suggested seems forced and unauthorized. Section 34 of chapter 90 of said statutes reads: "Every person who shall be convicted of any gross fraud or cheat at common law shall be punished, etc." Section 5, c. 98, Id. reads: "Every person who shall become an accessory after the fact to any felony, either at common law or by any statute made, or which shall hereafter be made, may be indicted," etc. Our statutes in no place declare that any act shall constitute the crime of libel, or that such crime shall be punished, yet they provide as to what evidence may be given, and as to the form and substance of the indictment in prosecutions for such crime. Comp. St., p. 734, § 6; Id., p. 756, § 3; Id., p. 760, § 17. These sections are an

admission or recognition by the legislature of the fact that common law offences may be punished in this state. This conclusion is in accordance with the views entertained by the courts generally throughout the United States. See authorities cited in note to section 36, 1 Bish. Crim. Law, (3d Ed.)

Ohio seems to be an exception to this general rule, but we have carefully examined the statutes of that state, and do not find that they, like our statutes, recognize the existence of common law offences. The cases cited from that state can, therefore, not be held as opposed to the decision arrived at in this case. The case of *Estes v. Carter*, 10 Iowa, 400, holds that no common law offence not recognized by the criminal statutes of that state will be treated or punished as a crime by the courts. The decision is based on two grounds — *First*, the peculiar wording of the constitution of that state; and, *second*, that the statutory offences so nearly cover all the common law offences that it is reasonable to infer that those which were omitted were intended to be excluded. If the statutes of that state, to which we have not had access, are similar to ours, we cannot admit that the second ground on which the decision is based is tenable, for it is certainly a well settled rule that statutes are not to be construed as repealing the common law beyond their words, or the clear expression of their provisions. Beyond this, no admitted rule of interpretation permits is to presume an intention to repeal. See authorities above cited.

There is a remark made by the court in the case of *Benson v. State*, 5 Minn. 21, (Gil. 6), which the counsel for the defendant refers to in support of his view, but the point was not considered or decided by the court in that case. This remark deserves, and has received, the consideration due to the views of the learned judge who delivered that opinion. Whether it would be wise for the legislature to repeal the common law as a source of jurisdiction in criminal matters, it is not for us to determine.

If common law crimes are suspended or abolished by our statute, so are "criminal proceedings"; but the legislature, by the express and particular repeal of certain criminal practice and proceedings (Comp. St. p. 735, § 14; Id. p. 785, § 37) clearly indicated that they did not consider the general statute as affecting such repeal. The gist of this offence is the unlawful confederation, and it is not necessary to prove an overt act in pursuance of it. *Com. v. Judd*, 2 Mass. 329. The exceptions are overruled.

BERRY, J.—I dissent. In my judgment no offences at common law are offences in this state, except such as are specifically recognized by our statutes.

BUCHNER *v.* THE CHICAGO, MILWAUKEE & NORTH-  
WESTERN RAILWAY COMPANY

SUPREME COURT OF WISCONSIN, 1884

[60 Wis. 264, 19 N. W. 56]

1. An expression of opinion upon a point involved in a case, argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the case, if a *dictum*, should be considered a *judicial dictum* as distinguished from a mere *obiter dictum*, i. e., an expression originating alone with the judge writing the opinion, as an argument or illustration.

2. Thus where in an equitable action it was contended (1) that the plaintiff is entitled to no relief, and (2) that if he has any remedy it is not in equity, and this court sustains the latter contention, holding that there is an adequate remedy at law, that part of the opinion which states that the plaintiff has a remedy at law and indicates what that remedy is, is not *merely obiter*.

3. The doctrine of *Buchner v. C. M. & N. W. Ry. Co.*, 56 Wis. 403, that the lowering by a railway company of the grade of a highway, in order to adjust such grade to that of its track laid across such highway, is a taking of the property of the owner of a lot abutting on that part of the highway so lowered, for which and for the consequent injury to such lot the railway company must make compensation, although the track itself does not encroach upon that part of the highway of which the fee is in such lot-owner, is reaffirmed.

4. If, in such case, the railway company neglects to have such compensation ascertained, the lot-owner may institute proceedings in that behalf, under Sec. 1852, R. S.

Appeal from the Circuit Court for Waukesha county.

The case is thus stated by Mr. Justice CASSODAY:

"During the times in question the plaintiff owned and occupied as a homestead a lot of about an acre and a half of land in the town of Waukesha, fronting northeasterly upon and extending to the center of the South Milwaukee road, or Broadway, — such front being about 250 feet in extent, and the line of such front running in a northwesterly and southeasterly direction. The southeasterly side of said lot was upon the Prospect Hill road. In 1881 the defendant constructed its railroad track in nearly an east and west direction across said Broadway, at a point so near the northwesterly line of the plaintiff's said lot, at the place of crossing that the center of the railroad track was eleven feet and the end of the ties seven feet northwesterly from the northwest corner of the plaintiff's said lot in the center of said Broadway. In crossing said Broadway with said railroad track the defendant dug down and placed its track six feet below what was the former surface of said Broadway, and to restore said Broadway to its former usefulness it graded down the whole surface of that portion of said Broadway upon which the plaintiff's said lot so fronted, including the half to which the plaintiff had the legal

title, from the surface at Prospect Hill road-crossing to a depth of five feet and eight inches below the former surface of the street at the plaintiff's northwest corner in the center of said street. When such work and grading were nearly completed, the plaintiff filed a bill in equity to enforce the defendant to proceed and condemn that portion of his land constituting one half of said highway, upon which the defendant had so entered, cut down, and removed the dirt and graded down the same, and also to ascertain and recover the damages thereby sustained, and for an injunction until such damages were ascertained and paid. The court found, among other things, as a matter of fact, that the premises of the plaintiff had, by reason of such change of grade, been injured and depreciated in their market value to the extent of \$1,500; and, as a conclusion of law, that although the plaintiff would be entitled to recover such damages in a proper action, yet that he could not maintain that action; and hence dismissed the complaint with costs. The judgment entered thereon was affirmed by this court. See 56 Wis., 403, where the facts of that case are fully reported.

"Afterwards the plaintiff filed this petition for condemnation, alleging substantially the same facts as in the bill of complaint; and thereupon the time of the hearing was fixed, and due notice thereof was given to the defendant, which filed an answer to the petition, substantially admitting the facts stated, and alleging that it had not built or constructed any of its line of road upon any portion of the plaintiff's land, and that the grading of the street on the front of the plaintiff's lot was in pursuance of the order and directions of the supervisors of the town. After a hearing the judge of the court, at chambers; by order appointed three commissioners therein, with the usual directions. The defendant excepted to the order and ruling of the court thereon. August 28, 1883, the defendant, in pursuance of notice, moved the court to vacate and set aside the order so made, but the motion was denied by the court; and from the order denying the same the defendant appealed."

For the appellant there was a brief by *Jenkins, Winkler & Smith*, and oral argument by *Mr. Jenkins*. They contended, *inter alia*, that the decision in the former case (56 Wis., 403) was merely that that action would not lie, whatever might be the rights of the plaintiff, and, that being decided in favor of the defendant, it was not pertinent to the issue to pass upon any other question involved, and neither party is concluded in any other respect by anything said in that opinion. *Hardy v. Mills*, 35 Wis., 149; *Woodgate v. Fleet*, 44 N. Y., 1-13; *Lathrop v. Knapp*, 37 Wis., 307; *Johnson v. N. W. N. Ins. Co.*, 39 id., 96 The cutting down

of the highway was not a taking of property within the meaning of the constitution. It was the simple performance of an act required by law to be done; it was done under authority of the supervisors of the town, who were authorized to change the grade in their discretion, and for such change if made by the town no action would lie by the plaintiff; it was done for the benefit of the public and not for the benefit of the company; by no proceedings could the company acquire any right in that highway; and until the legislature shall otherwise provide, an act so done for a public purpose under sanction of legislative authority, though causing incidental injury to property, is not the basis of an action. The case is not with section 1852, R. S., and the plaintiff could not take the initiative in condemnation proceedings. *Sherman v. M., L. S. & W. Ry. Co.*, 40 Wis., 652; *Blesch v. C. & N. W. Ry. Co.*, 43 id., 192; *Bohlman v. G. B. & L. P. Ry. Co.*, 30 id., 108; *Carl v. S. & F. du L. R. R. Co.*, 46 id., 625.

For the respondent there was a brief signed by *Finches, Lynde & Miller*, attorneys, and *B. K. Miller, Jr.*, of counsel, and the cause was argued orally by *B. K. Miller, Jr.*

CASSODAY, J.—The facts in this case are substantially the same as in *Buchner v. C., M. & N. W. Ry. Co.*, 56 Wis., 403. We are informed by the learned counsel for the appellant that “this appeal is taken upon the assumption that most that was delivered in that opinion was merely *obiter*, unnecessary to the decision of that case, and not binding upon the parties, and much of it upon points not argued, and that Mr. Justice LYON was [there] led into the expression of opinions which cannot be sustained upon reason or authority.” The correctness of this assumption, of course, depends upon the record of that case, which speaks for itself.

It would seem that judges, as well as lawyers, sometimes differ as to what may properly be regarded as *obiter dictum*. It is not infrequent, in courts of last resort composed of several judges, for all to come to the same conclusion, but from different views of the law, and hence it may at times be difficult to determine the precise principle upon which the case was decided, or what may properly be deemed mere *obiter*. “According to the more rigid rule,” says Bouvier, “an expression of opinion, however deliberate, upon a question, however fully argued, if not essential to the disposition that was made of the case, may be regarded as a *dictum*.” This seems to be the view of the learned counsel for the appellant. Under this “more rigid rule,” it is believed that, comparatively, there are but few opinions in the books which contain no *obiter dictum*; that is, nothing which was not absolutely essential to the disposition made of the case. Under that rule

what is here being written is nothing but *obiter dictum*. But Bouvier adds that "it is, on the other hand, said that it is difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point." Such *dictum*, if *dictum* it is, should, it would seem, be regarded as "*judicial dictum*," in contradistinction to mere *obiter dictum*,—that is, an expression originating with the judge alone, while passing, by the way, in writing his opinion, as an argument or illustration drawn from some collateral question. But even in that sense, we apprehend, there have been but few judges, occupying the bench for any considerable length of time, who have always been so precise and concise in their opinion as not to be subject to that criticism. As illustrations, we call to mind such expression of *obiter* by no less distinguished judges than Sir Matthew Hale, Lord Chief Justice Kenyon, and Lord Chief Justice Denman, as will appear by reference to the following cases: *Steel v. Houghton*, 1 H. Bl., 53; *Parton v. Williams*, 3 Barn. & Ald., 341; *Bast v. Byrne*, 51 Wis., 536. Besides, mere *obiter* is not always reprehensible. On the contrary, some of the most sacred canons of the common law had their origin in the mere *dicta* of some wise judges. To be valuable, however, they must of course be right.

But the opinion of the court in the former case cannot, we think, be regarded as merely the individual expressions of opinion of Mr. Justice Lyon upon collateral questions, while passing along in writing the opinion. Of course, an opinion of an appellate court, to be of any practical value to the trial court, must deal with the facts presented and the questions involved and discussed at the bar, even though some of them may only be indirectly involved in the determination of the main question upon which the case finally turns. On the trial of the equity suit brought by the plaintiff against this defendant to enforce the condemnation in question, and for an injunction until the damages should be ascertained and paid, the trial court found, in effect, that by cutting down the street in front of the plaintiff's dwelling-house the defendant had injured and depreciated the market value of his premises to the extent of \$1,500, and, as a conclusion of law, that although the plaintiff *would be entitled to recover such damages in a proper action*, yet he could not maintain his bill in equity therefor; and hence dismissed the same with costs. The plaintiff appealed to this court, and of course the correctness of that adjudication was directly involved. The issues there presented, the findings of fact and conclusions of law, the points raised and dis-



cussed by counsel on both sides, are all fairly presented in the report of the case. Among the questions thus discussed by counsel *pro* and *con* were, in effect, these: Whether the plaintiff was the owner in fee of one half of the road-bed thus excavated and graded down; whether he had the right to protect the same for ordinary street purposes; whether he could be deprived of ingress and egress to and from the street to his dwelling-house without compensation; whether the construction and maintenance of the railroad at the point in question imposed a new burden or servitude upon the portion of the street belonging to the plaintiff; whether such excavation and removal of the earth was a taking of the plaintiff's property within the meaning of sec. 13, art. I, of the constitution; whether the interest of the plaintiff in the highway was such as to require the defendant to condemn the same and pay for it prior to such taking; whether such condemnation could be enforced in equity by injunction.

Counsel for the defendant then sought to sustain that judgment upon two grounds, which were to the effect: (1) That the damages complained of were incidental merely, and not such as would entitle the plaintiff to recover in *any* action; (2) that assuming that he could recover in a proper action yet that his bill in equity was properly dismissed. This court determined the first proposition against the defendant, and the second in its favor. The complaint now is, in effect, that it was mere *obiter* to determine the first proposition, by reason of the conclusion reached upon the second proposition. Upon the same theory it would have been mere *obiter* to say anything upon the second proposition, had we determined the first proposition the other way. To confine this court to the consideration of a single proposition, where several are involved and fully discussed by counsel, might at times operate to prolong litigation, increase the number of appeals, and inflict unnecessary burdens upon both parties and the public, and yet it may be highly proper. It will be observed that the judgment was affirmed upon the same theory upon which it was decided by the trial court, to wit, that although the plaintiff was entitled to recover in a proper action, yet by going into a court of equity he had misconceived his remedy. Counsel complain because the opinion is not confined to simply holding that the plaintiff could not maintain that action. But the ground of that decision was that the plaintiff had a perfect remedy at law. We agree with counsel that "it is not well, ordinarily, for courts to suggest remedies;" but, when counsel insist that a bill in equity must be dismissed because the plaintiff has a complete remedy at law, they are not in a very good position to complain, because, in deciding in their favor on the proposition suggested, the court

referred to such remedy in unmistakable terms, instead of keeping it a profound secret, or referring to it in such vague and general terms as to mislead the other party. We do not hold that the finding of the court in the other case as to the amount of damages is *res adjudicata* in this case; nor that all that was said in that case is absolutely binding upon the parties and the court in this case; but simply that that opinion cannot fairly be treated as "merely *obiter*." So much in deference to the earnest argument of the able counsel for the defendant on the subject of *obiter*.

We are now to consider whether counsel was correct in claiming "that Mr. Justice LYON was led into the expression of opinions which cannot be sustained upon reason or authority." It is conceded by all parties that the plaintiff's land extended to the center of Broadway, subject to the public easement over the same as such highway. It must be conceded, for the purposes of this case, that the street in front of plaintiff's premises had, long prior to the time in question, been taken for the purposes of a public highway. We moreover assume that adequate compensation for such taking for the use of a public highway, if required, was made at the time of such taking. This being so, it is undoubtedly true that the supervisors of the town, under their authority as such, had the right, for the purpose of improving the street, to enter upon the highway in question, and with ordinary care and skill to excavate, cut down, and lower the grade of the same, and for such change of grade by them for such a purpose the plaintiff would have been without remedy. This was settled in *Harrison v. Supervisors*, 51 Wis., 663, and cases there cited. But even the supervisors, for the purpose of improving the highway, have no right to extend an embankment or deposit earth outside of the limits of such highway without subjecting the town to additional liability. *Ibid.* Nor does it necessarily follow that even the supervisors of the town could make such excavation and change of grade as was made in the present case for the purpose of constructing a railroad. It is well settled in this state that the appropriation of a public highway for the purposes of a railroad is the imposition of an additional burden upon the abutting owners, and hence is the taking of private property for public use within the meaning of sec. 13, art. I, Const. *Ford v. C. & N. W. R. R. Co.*, 14 Wis., 609; *Pomeroy v. M. & C. R. R. Co.*, 16 Wis., 640; *Hegar v. C. & N. W. Ry. Co.*, 26 Wis., 624; *Sherman v. M., L. S. & W. R. R. Co.*, 40 Wis., 645; *Blesch v. C. & N. W. Ry. Co.*, 43 Wis., 183. This being so, neither the legislature nor any municipality could authorize such taking without, at least, making provision for compensation therefor. *Ibid.* It follows that the defendant company would not have had the right to make the excavation and grading

in question for the purposes of a railroad track and road-bed for the same without the consent of the abutting owners, and without condemnation and compensation therefor in the manner provided by the statute.

Had the company so constructed its road-bed and track in and upon said street, its liability for damages would not have been confined to the land occupied by the track, nor by the road-bed, nor even the track, road-bed, and necessary ditches, but would have covered all land rendered useless or destroyed for the ordinary purposes of a highway, or otherwise. *Hegar v. C. & N. W. Ry. Co., supra.* But while the defendant did make the excavation and cut down and grade the street, yet it did not lay its track upon any portion of the plaintiff's land, nor any portion of the street in front of his premises, and had no purpose of doing so. Does the mere absence of the track, or any purpose of putting it there, deprive the plaintiff of any remedy for the excavation of his land and the removal of his soil? The authorities cited establish, beyond all controversy, that the plaintiff owned the soil to the center of the street. It was his private property, subject only to the public easement. No one had any right to interfere with it, except for the purposes of travel, and the town or district authorities, for the purposes of improving it as a public highway. Any other interference was a trespass. Being private property, except for those purposes, neither the legislature nor the municipality could, without new and additional compensation, impose any new burden or servitude upon it, or authorize the excavation and removal of any portion of the plaintiff's land.

But it is claimed that the railroad company did not excavate and remove the plaintiff's soil and grade down the street in question for the purposes of the railroad, but only to restore the street, after the construction of its railroad across the same, to such condition that its usefulness should not be materially impaired, and that those things were done under the direction of the supervisors of the town. A railway company gets its life and authority from the statute, and only for the purposes named in the statute. Such a company has no vicarious power to act for and in behalf of the supervisors in changing the grade of a street, under the highway laws of the state. Whatever right it may have in that regard is imposed upon it as a condition of constructing its railroad. Its right to take private property for its use is only by virtue of its chartered rights, and then only for the purposes therein designated. Such taking must, therefore, necessarily be by the authority, in the manner, and for the purposes prescribed in the statute, and then it can only be authorized upon the condition of compensation or consent. A railway company

cannot be a traveler upon a highway, nor a supervisor of a town, nor can it have imputed to it the rights or privileges of either. Its agents and employees may, but the company, as such, cannot. These things being so, as between the railway company and the abutting owners of a highway the lands within the limits of the highway are private property. The taking of it by a railway company must, necessarily, be the taking of it for the use of the company. It has no right to take for any other use. Other uses, or uses by other parties, may grow out of or be incidental to such taking, but the taking, nevertheless, is by the railway company and for the railway company. The lands within the limits of such highway being, as between the abutting owners and the railway company, private property, such company can have no additional rights by reason of the easement in favor of the public, nor by reason of the authority to change the grade existing in the town.

The defendant railway was expressly empowered, subject to the provisions of section 1836, R. S., "to construct its railroad across, along, or upon any highway; \* \* \* to carry any highway \* \* \* *over or under its track*, as" might "be most expedient for the public good; to change the course and direction of any highway, when made necessary or desirable to secure more easy ascent or descent by reason of any embankment or cut made in the construction of the railroad, *and take land necessary therefor*: provided, such highway or road be not so changed from its original course more than six rods, nor its distance thereby lengthened more than five rods." Subd. 5, sec. 1828, R. S. The conditions contained in sec. 1836, R. S., subject to which the above authority is given, provide, in effect, that such railway "*shall restore every \* \* \* highway \* \* \* across, along, or upon which such railroad may be constructed, to its former state, or to such condition as that its usefulness shall not be materially impaired, and thereafter maintain the same in such condition against any effects in any manner produced by such railroad.*" Thus it appears that whenever the railway company constructs its railroad across, along, or upon a highway, it must not only restore the same to as good a condition of usefulness as it was in before, but must thereafter maintain the same in such restored condition. As it is impossible to restore without entering upon the land and doing the things necessary to restore, so it is impossible to maintain the same in such restored condition without preserving and continuing such condition of things, and from time to time re-entering and replacing or removing materials. Such continuing duty is coupled with a supposed permanent right, and necessarily imposes a new burden or servitude upon the abutting owner's pri-

vate interest and property in the land constituting highway. Besides, there is a possibility that the defendant may still further lower or elevate its track, which would necessitate further changes in order to restore the highway to a condition of usefulness.

But the right given to a railway company to construct its railroad across, along, or upon any highway, and to carry any highway over or under its track, as provided in sec. 1828, by restoring such highway, and then maintaining it in such restored condition, is given only subject to the further provisions of sec. 1836, that "when any lands shall be required in order to change any highway" in any of the methods named, then "the same may be condemned, taken, and compensation made" therefor "in the manner provided in" that chapter. True, in *Harrison v. Supervisors*, 51 Wis., 645, it is said that "the altering of a highway, within the meaning of such constitutional provision, clearly means an alteration of its course, and not a change of its grade." Page 658. That was the necessary result of holding that so long as the highway authorities kept within its limits, there was no taking within the constitutional provision. But here the statute is speaking of constructing a "railroad across, along, or upon a highway." Such construction is clearly a taking, within the meaning of the constitution, in each of the cases named. No one would, we apprehend, claim that the clause of the statute requiring condemnation and compensation does not apply when the railroad is constructed "along or upon a highway," nor to so much of the street occupied by the railroad in crossing a highway. So it seems to us that it applies to that portion of the highway which the railway company, as a condition of constructing its railroad across, along, or upon a highway, is required to restore to its former condition of usefulness, and thereafter to maintain in that condition. This "change" of the highway necessitated by the construction of the railroad must, therefore, be a taking, within the meaning of the constitution, and since it must thereafter be permanently maintained by the railway company, there must necessarily be condemnation and compensation.

Applying the statute to the facts of this particular case, it is the same as though the legislature had said in direct terms to the railway company: "You may cross Broadway at the point designated, and cut down and excavate the same, so that your track may be six or any other number of feet below the present surface of the street at that point, but you can do so only on condition that you cut down, excavate, and grade the whole of Broadway on a smooth inclined plane from the surface of Prospect Hill road to the level of such railroad track when con-

structed." So construing the statute, and it in effect declared that at the point designated the railway company should so construct its road-bed that the sides should have no greater incline or slope than existed in Broadway after it was so restored. Certainly the road-bed is not to be confined to the very land beneath the ties and rails, but to all that is essential in the construction and maintenance of the road-bed. *Hegar v. C. & N. W. Ry. Co.*, 26 Wis., 624. Had the necessities of the case required the company to fill in and construct an embankment over the whole surface of Broadway, from Prospect Hill road to the railroad track, in order to construct the railroad, there would seem to be no doubt but what it would have constituted a part of the road-bed. The remote parts of such embankment would have been just as essentially a part of the road-bed as the portion directly under the rails or ties. Such remote parts would have been a taking within the meaning of the constitution. *Harrison v. Supervisors*, 51 Wis., 645. To our minds, it was no less so because it was necessary to excavate instead of embank.

Leaving out of view the fact that the public had a right of easement over Broadway for the purposes of travel, and the further fact that the supervisors had the right to change the grade of the same to promote such purpose, and no one could, we apprehend, successfully maintain that such cutting down, excavation, and removal of the soil could be justified without condemnation of the land and compensation to the owners. And yet, as between such abutting owners and the railway company, in the matter of such cutting down, excavation, and removal of the soil, the existence of the highway in no respect figures, because, as against the railway company, it was private property.

The liability of the company is not limited to its absolute physical necessities, but is measured by its imperative *legal* necessities. If we are correct in the views taken, then what was done in changing the grade of Broadway was a necessary condition imposed by the statute on the company in constructing its railroad across the highway at so great a distance below the surface as it did, and hence was an essential part of the road-bed at that point. This being so, and the corporation having omitted to prosecute the same, and not having acquired title to the lands upon which that part of the road-bed had been constructed, it would seem to follow that the case is one where the party interested in the lands may institute and conduct the proceedings to a conclusion, within the meaning of sec. 1852, R. S. This view of the facts and the statute seems to distinguish the cases cited by counsel as being in conflict with the opinion written by Mr. Justice Lyon in the former case.

*By the Court.*—The order of the circuit court is affirmed, and the cause is demanded for further proceedings according to law,



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